Supreme Court U.S.

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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

October Term, 1994

W.R. GRACE AND COMPANY-CONN.,
Petitioner,

v.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition arises from an appeal following a lengthy jury trial of multiple claims and affirmative defenses involving allegations of property damage caused by asbestos-containing fireproofing installed in buildings Respondent constructed nearly two decades before commencing suit. The Illinois construction statute of repose would bar suit if applied. Petitioner seeks a Writ of Certiorari to review the decision of the Seventh Circuit Court of Appeals affirming judgment against Petitioner on one theory of liability despite the jury's co-equal special verdict that Petitioner engaged in the precise activity which qualifies a party as a member of the class immunized by the repose statute from any and all claims brought ten years after construction. The following Questions would be raised:

1. Does the Seventh Amendment's right to trial by jury and its prohibition on reexamination of facts tried by a jury prohibit a federal court of appeals from disregarding a jury's special verdict findings *in toto*, reexamining the same disputed dispositive facts, and reaching an opposite conclusion from that of the jury?

2. Do the Fifth and Fourteenth Amendment guarantees of equal protection and due process under the law prohibit a federal court of appeals from construing or applying a state improvement to real property statute of repose to exclude certain classes of parties on the basis of trade status, while protecting all other like-situated parties to the improvement project, when the highest court in the forum state has declared that the statute meets constitutional scrutiny only if, and precisely because, it equally protects all parties to the improvement from all stale claims of liability?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties to the proceedings below are those listed in the caption on the cover of this petition.

W.R. Grace & Company is the parent corporation of W.R. Grace & Company-Conn. Grace's subsidiaries or partnerships, other than wholly owned operations, are: A-O Grace Kaustik, Boodin Partnership, Carbon Dioxide Slurry Systems LP, Grace Cocoa Associates LP, Grace Offshore Turnkey, Grace Ventures Partnership I & II, Healthcare Medical, Immunecare of Hollywood, Immunecare of Key West, Infusion Systems, New Bedford Infusioncare, Nippon Dearborn Kabushiki Kisha, North Suburban Dialysis, OB One & IVtoo, Palm Springs I.V. Care II, Paramount Coal Company, Pharmacy Direct, Primecare Home Health Services, Grace Specialty Chemicals Indonesia P.T., Pursue Gas Processing and Petrochemical Company, Quality Home Care Services of Watertown, NY, Sleep Diagnostic Associates, Sisters of Charity Home Health Care, and VNA-NMC Homecare Partnership.

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To the United States Court of Appeals
For the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

W.R. Grace & Company-Conn. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Opinion of the United States District Court for the Central District of Illinois denying Grace's motion for summary judgment was issued on December 30, 1992. It is reported at 834 F. Supp. 1046 and reprinted in the Appendix ["A-_"] A-53-64. The District Court's Opinion during trial, taking under advisement Grace's motion for judgment as a matter of law on repose immunity issued on April 22, 1993 is unreported, and is reprinted in A-40-52. The District Court Opinion denying Grace's post-trial motions issued on October 26, 1993 is reported at 834 F. Supp. 1052, and reprinted at A-9-39. A panel of the Seventh Circuit issued its Opinion on May 17, 1994. That Opinion is reported at 24 F.3d 955 and reprinted at A-1-7.

The jury's special verdict on State Farm's liability claims and Grace's statute of repose affirmative defense was filed on May 11, 1993. These are reprinted in the Lodging [hereinafter cited "L-_"] accompanying this petition. The citations to the trial transcript are designated herein as "Tr-_."

JURISDICTION

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1), which provides for review of cases in the courts of appeals "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. Under 28 U.S.C. § 2101(c), the writ of certiorari to the Supreme Court must be "taken or applied for within ninety days after the entry of the such judgment or decree." *See also Sup. Ct. R. 13.1.* The 90 day period commences from the date of a denial of petition for rehearing, or the entry of the subsequent judgment. *Id.* at 13.4. In this case, Grace filed a petition for rehearing which was denied on June 16, 1994. [A-8]. The 90 day period would expire on September 14, 1994.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. Amend. XIV.

Section 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. V.

No person shall be ... deprived of life, liberty, or property without due process of law.

Ill. Const., Article I, section 2.

No person shall be ... denied equal protection of the laws.

STATUTORY PROVISION INVOLVED

Ill. Rev. Stat., 735 ILCS 5/13-214. *Construction -- Design management and supervision.* As used in this Section "person" means any individual, any business or legal entity, or any body politic.

(b) No action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission.

STATEMENT OF THE CASE

This Petition seeks review of a federal appellate court's cursory disregard of specific jury findings of fact that a manufacturer/supplier of fireproofing building material engaged in the precise activities that qualified it for immunity from stale claims under the Illinois improvement to real property construction statute of repose. The appellate court reexamined those same disputed facts and reached opposite findings from that of the jury. Review is also sought of the federal appellate court's application of the state statute of repose to exclude manufacturers/suppliers of constituent elements of improvements to real property from protection under that statute protecting all other parties involved in the construction project from stale claims. The appellate court's analytical process, factual findings, and conclusion violate the constitutional guarantees of the Fifth, Seventh, and Fourteenth Amendments.

I. BACKGROUND

In 1963, Petitioner W.R. Grace & Co.-Conn. ("Grace") purchased the assets of the Zonolite Company, a manufacturer of various building and construction materials including a brand of fireproofing called Monokote.[1] In addition to its manufacturing activities, Grace's personnel routinely worked with architects, builders and installers on major construction projects regarding the design, planning, specifications,

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[1] Monokote was a cementitous building material designed to prevent structural steel from buckling and collapsing in a fire. When properly applied to structural steel in thicknesses specified by Grace's and UL tests, it provided fireproofing protection for the useful life of the building. Monokote-3 fireproofing contained vermiculite, a gypsum binder, and chrysotile asbestos. Grace explained the content of Monokote-3 to State Farm's national architectural firm. [Eg. Def. Tr. Ex. 368].

installation, and testing of its fireproofing so as to meet building code requirements and specific building needs. [*Eg.* Tr. 672-73, 3202; *see also* note 4, *infra*]. In 1970-73, Respondent State Farm Mutual Automobile Insurance Company ("State Farm") had Monokote-3 installed in several office buildings during their original construction. State Farm commenced this suit against Grace in January 1989 asserting property damage due to the fireproofing allegedly releasing asbestos fibers. Jurisdiction of the Illinois federal district court was premised on diversity of citizenship pursuant to 28 U.S.C. § 1332.

Before trial, Grace moved for summary judgment that, like other parties to the original construction, it too was immunized from State Farm's stale claims under the Illinois construction statute of repose. The statute provides that:

> No action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission.

Ill. Rev. Stat. 735 ILCS 5/13-214(b).[2] Despite the undisputed

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[2] This Court has affirmed the import and validity of statutes of repose which provide all members of a protected class with vested right to immunity from claims of liability after a certain number of years. *See, e.g., United States v. Kubrick*, 444 U.S. 111, 117 (1979) (statutes of repose afford to "plaintiffs what the legislature deems a reasonable time to present their claims [and] protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise").

facts that Grace designed, manufactured and supplied the fireproofing material for the original construction of State Farm's buildings, and the statutory immunity for claims arising out of "construction of an improvement to real property," the district court denied the summary judgment motion. [A-61-63]. Grace again moved during the trial for judgment as a matter of law on repose immunity. The district court took that motion under advisement, stating that the issue was "extremely close". [A-14; A-41]. It held that Grace's entitlement to the repose defense would be determined "by the extent to which W.R. Grace's involvement met the statutory threshold of 'design, planning, supervision or observation.'" [A-14; A-41-42].

II. SUMMARY OF TRIAL

The case was tried to a jury over the course of seven months (a total of 50 trial days) on State Farm's liablity claims as well as Grace's defense of statute of repose immunity. State Farm tried to persuade the jury that Grace's fireproofing was defective and unreasonably dangerous when it left Grace's manufacturing plant, that Grace was fraudulent in its warnings regarding its fireproofing, and that Grace's conduct was willful and wanton so as to impose punitive damages. The jury specifically rejected each one of those claims.[3] [L-1]. It found

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Because asbestos-in-building property damage claims may be barred by various statutes of repose and limitations, many states have passed so-called "revival" statutes. *See, e.g.*, Minn. Rev. Stat. § 541.22, *discussed in Appletree Square Ltd. Partnership v. W. R. Grace*, __ F.3d. __, 1994 WL 372036 (8th Cir., July 19, 1994). Illinois had not instituted such legislation; the application or constitutionality of such revival statutes is not at issue here.

[3] Grace offered evidence, *inter alia*, to show that allegations of hazards associated with in-place asbestos are greatly overstated and that the fireproofing in State Farm's buildings should not be

Grace liable on the single count of negligence, and it also found that State Farm was 30 percent contributorily negligent. [L-1-2].

On the dispositive defense of statute of repose immunity, Grace presented evidence that its personnel consulted with State Farm's architects about the design and planning of the fireproofing needs of this construction project. Grace further showed that it met and consulted with State Farm on construction-related problems, inspected the fireproofing on the job site, and conducted additional on-site testing of the fireproofing. Although State Farm argued to the jury that liability should be imposed on Grace for construction-related activities, it argued that those same activities were of no significance to the jury's resolution of the repose question.[4] The

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removed. State Farm's own air testing showed that the levels of asbestos fibers in the ambient air in its buildings were well under OSHA and EPA standards. [Tr. at 6760-65]. *See also* NESHAP, *Clarification of Intent*, 58 F.R. 51784-01 (October 5, 1993) (clarifying previous misunderstanding of EPA's position as "encouraging unnecessary and unwise (from a health standpoint) removals" of asbestos materials); S. Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation*, at 12-13 (Harvard University Press 1993) (leaving asbestos-containing material in buildings poses no appreciable risk: "Most experts believe that white asbestos [the kind in Monokote] left in place is virtually harmless ... The risk is so small as to be virtually meaningless.").

[4] State Farm argued to the jury on liability that: "While our job is going on, we've got a problem. This powdery falloff already with Monokote. This is October 1972. This is a memo concerning the problem written by Grace individuals about our job. Hard to read. Monokote has powdery falloff found on top of ceiling tile. Well, that's the same thing we had 20 years later. Mr. Egan [Grace representative] comes down to our job, Exhibit 1228, and we'll talk about Mr. Egan's letter. He assures us that we're going to have a problem-free future with respect to dusting

jury was asked to answer a special verdict question on the repose defense taken directly from the repose statute and tailored by the court to fit this case:

> Did W.R. Grace provide design, planning, supervision, observation or management of construction services related to installation of fireproofing to State Farm Mutual Automobile Insurance Company in addition to supplying bags of Mono-Kote 3 and Mono-Kote 4 fireproofing?

[L-3].[5] After hearing the evidence and weighing conflicting arguments on Grace's repose defense, the jury returned its verdict. Despite State Farm's arguments that the jury should answer "**No**", the jury agreed with Grace and answered, "**Yes.**"

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and no continuing maintenance problem for Monokote. And we'll see, ladies and gentlemen, that just hasn't turned out to be true." [Tr. at 6698].

On the other hand, State Farm argued to the jury on repose immunity that: "There's a question, did Grace provide design planning, supervision, observation, or management of construction services related to the installation in addition to selling the product. They did not. The only thing they did was come down when there was a problem just like any manufacturer would. And that's very important because we are suing them as the manufacturer. We ask on that question whether they provided these additional services, you check no, because they did not. They had no contract to do so. The only time they came is like any other manufacturer would come if there was a problem. Of course, they didn't tell us the truth about the problem but they came." [Tr. at 6863].

[5] The aspect of the Illinois repose statute which immunizes parties that engaged in the "construction of an improvement" *per se* was not asked of the jury inasmuch as Grace's manufacture and supply of the fireproofing material was an undisputed fact.

[*Id.*]. Thus, in addition to designing, testing, manufacturing and supplying the Monokote fireproofing to State Farm, the jury found that Grace provided the enumerated job-specific services which immunize it from State Farm's claims under the repose statute.

Following trial, Grace moved the district court to dismiss the sole remaining claim of negligence consistent with the jury's verdict on the repose defense and its rejection of all other State Farm liability claims. The court refused to grant Grace statutory immunity from the negligence claim despite its earlier ruling that the jury would determine whether Grace's activities, beyond construction of the fireproofing, met the statute's requirements and the jury's verdict that it did. The court did not hold (nor did State Farm argue) that the jury's repose verdict was unsupported by the evidence. Rather, it rejected the jury's findings as non-binding. [A-25]. It entered judgment against Grace for $12.5 million on the negligence finding. [A-38]. Grace appealed on the sole issue of its repose immunity.

III. *THE COURT OF APPEALS' OPINION*

A three-judge panel of the Seventh Circuit Court of Appeals affirmed the judgment against Grace in a terse, three page reported opinion that ignored the jury's verdict in its entirety[6] and cursorily disregarded the jury's special verdict on

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[6] The Seventh Circuit never acknowledged the jury's verdict explicitly rejecting three of State Farm's liability claims and instead adopted lop-sided versions of the facts which the verdict, in its entirety, does not support. As one example, the court wrote that Grace's motivation in selling Monokote-3 was to "unload its inventory" on State Farm and to circumvent price controls. [A-2]. These characterizations are contrary to the jury's finding that Grace was neither fraudulent nor willful and wanton in any of its conduct. [L-1]. The court also recited allegations of Grace's

the statute of repose as a "red herring" [A-3]. The court reexamined the evidence and reached the contrary factual conclusion that Grace did not engage in the construction activities found by the jury (again, on appeal, State Farm did not assert that the jury verdict was without support in the evidence). The Seventh Circuit made its own findings on this dispositive defense without any support in the record, much less the verdict, stating that Grace "merely sold bags of Monokote" to State Farm. [A-4; emphasis in original]. Although the jury had expressly found that Grace provided "design, planning, supervision, observation or management of construction services related to installation ... in addition to supplying bags of Monokote," the court ignored that finding. Instead, it made findings that, in its opinion:

> the activities in which [Grace] engaged in relation to the Monokote 3 used in the construction of State Farm's three buildings are not reasonably interpreted as design, supervision, observation, planning, etc.

[A-4]. Thus, contrary to construing facts to support the verdict, the Seventh Circuit gave no deference to the findings of the ten-person jury. It reexamined the evidence and reached its own conclusions that Grace did not engage in the precise activities set forth in the repose statute despite the jury's explicit verdict to the contrary.

The court made its own further factual findings that the jury's verdict on negligence could only have been based on

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"gratuitous" use of asbestos in its Monokote-3 without mention of the jury's rejection of State Farm's strict liability claim and finding the product was not "defective and unsafe" when it left Grace's control. [L-1; L-10-13].

manufacturing activity unrelated to the construction project. It wrote sweepingly that:

> [Grace's] negligence had nothing to do with the installation or application of the MonoKote... The problem was in the design of the Mono-Kote (to include asbestos), the failure to test the product, and the failure to warn about it... [Grace's] negligent acts or omissions [were] remote from building construction...

[A-5]. The court concluded that the statute "protects none of the activities that the jury could have found to be tortious." [*Id.*]. Yet, in drawing those inferences from the single negligence finding, the court did not even consider the substantial support in the rest of jury's verdict, the evidentiary record, or the arguments of counsel which makes the jury's single negligence finding consistent with the job-specific construction activities that the jury found Grace had performed in relation to State Farm when answering the repose question.

The Seventh Circuit also wrote that, in enacting the current version of the statute, the Illinois General Assembly evidently intended "to circumscribe its protection far more narrowly [i.e. to not protect suppliers of building materials]- in fact as narrowly as the Supreme Court of Illinois would permit" [A-4] -- without even looking at the legislative history or Illinois Supreme Court pronouncements about the constitutionally-required scope of the construction statute of repose to protect exactly such parties.[7] The court then held that Grace was not

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[7] As explained, *infra* at p. 21-24, the current version of the Illinois construction statute of repose was rewritten and passed to broaden its scope so as to avoid discriminatory application, meet constitutional mandates, and conform to requirements established by the Illinois Supreme Court's criticisms of the former statute's overly

entitled to the benefit of the jury's verdict on the statute of repose defense because Grace's activities, as the court described them, did not turn Grace into a "designer or builder." [A-4-5.]. Finally, ignoring extensive case law in Illinois applying the statute to constituent parts or components of overall improvements, the court concluded that "construction" of the building's fireproofing would not itself qualify Grace for immunity because, the court decided, the allegedly defective fireproofing in State Farm's buildings did not constitute an improvement to real property as a mere "spray." [A-6-7].

REASONS FOR GRANTING THE WRIT

The Court has traditionally held that "the criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven fact has been respected." *Wilkerson v. McCarthy*, 336 U.S. 53, 70-71 (1949) (Douglas, J., concurring). This case warrants the Court's review because it raises important issues of fundamental Constitutional rights and the related constraints placed on the authority of the federal appellate courts. This Opinion, if left to stand, jeopardizes the guarantees of the Seventh Amendment's protection of the right to have a jury's resolution of disputed material fact issues given effect and its prohibition against courts' reexamining facts that have been tried by a jury. The Opinion also erodes important equal protection and due process guarantees which preclude a federal court from construing a state statute contrary to what the highest court of the forum state has declared would render it unconstitutional.

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narrow protections excluding owners, tenants, manufacturers, and suppliers of building materials.

I. THE COURT SHOULD GRANT CERTIORARI TO REAFFIRM THE SEVENTH AMENDMENT'S PROTECTION OF THE RIGHT TO TRIAL BY JURY AND ITS PROHIBITION ON COURTS REEXAMINING FACTS TRIED BY A JURY.

The Seventh Amendment was adopted because the right to have facts determined by a jury in civil cases was considered "a safeguard too precious to be left to the whim of the sovereign, or it might be added, to that of the judiciary." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J. dissenting; emphasis added). The Amendment provides that:

> [T]he right of a trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const., Amend. VII.[8] Thirty years ago, this Court enforced the Seventh Amendment proscriptions on appellate court reexamination of facts tried by a jury in *Atlantic & Gulf Stevedores v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962). The Court reversed a federal appellate court that had ignored special jury verdict findings, and emphatically held:

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[8] In its early years, the Court stated that the Seventh Amendment was principally passed out of "the fear and alarm in respect to the appellate jurisdiction of this court over cases tried by a jury". *Justices, Etc. v. United States Ex. Rel. Murray*, 76 U.S. 658, 661 (1870); *citing Parsons v. Bedford*, 28 U.S. (3 Pet.) 443, 446 (1824). As such, the Court has noted that "[a]ppellate review in the federal courts is, of course, limited ultimately by the Seventh Amendment"). *Lumberman's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 53 n.5 (1954).

> We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them.

Id. at 359-60. *See also Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 112-14 (1963) (appellate court improperly invaded the jury's function and province by holding that the evidence at trial of a causal connection fell short of that required for consideration of a jury). Likewise, in *Tennant v. Peoria & Pekin Union R. Co.*, 321 U.S. 29 (1943), an appellate court concluded that insufficient proof existed to support a jury's finding of proximate cause and then substituted its own view of the evidence for that of the jury. In reversing, this Court narrowly prescribed the limits of appellate review of facts tried to a jury as follows:

> [The jury's] conclusion, whether it relates to negligence, causation, or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

Id. at 35.[9] When reviewing courts disregard jury verdicts and engage in *de novo* fact finding contrary to clear findings by juries, the consequences fail to serve either the public or the

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[9] In the context of reviewing district courts' findings of fact under Federal Rule of Civil Procedure 52(a), the Court in *Maine v. Taylor*, 477 U.S. 131, 145 n.17 (1986) emphasized that appellate courts are not "free to examine the record and draw [their] own conclusions.". *See also Anderson v. City of Besemer City*, 470 U.S. 564, 574-75 (1985) ("the trial on the merits should be the main event rather than a tryout on the road").

courts: "the injury is not limited to the defendant, there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the process of our courts." *Ballard v. United States*, 329 U.S. 187, 195 (1946).

Commentators have pointed out that for the past few decades this Court has not granted review in a Seventh Amendment case to restrain the reviewing courts from reexamining facts tried by a jury. They note a growing trend among reviewing courts to involve themselves in the fact-finding process and substitute their own interpretations of evidence for that of the jury:

> In the absence of Supreme Court scrutiny or intervention, the circuit courts have been free to work their will on civil jury verdicts. This protracted suspension of enforcement of the seventh amendment has tested the extent of the inherent self-restraint on the part of judges given the raw power to overrule any jury verdict with which they happened to disagree... The evisceration of the right to trial by jury which has become commonplace in the circuit courts is now entirely perceptible: the need for Supreme Court action to restore the vitality of the seventh amendment is equally clear.

E. Schnapper, *Judges Against Juries -- Appellate Review of Federal Jury Verdicts*, 1989 Wis. L. Rev. 237, 353-54 (1989); *cited in Nelson v. Production Credit Ass'n of the Midlands*, 930 F.2d 599, 607-8, n.9 (8th Cir.), *rehearing en banc denied, cert. denied*, 112 S.Ct. 417 (1991) (Heaney, J. dissenting) (noting an "unfortunate trend that is eroding the protection of the seventh amendment. Appellate reversals of jury fact-finding, once relatively rare, are now occurring more frequently."); G. Christie, *Judicial Review of Findings of Fact*, 87 N.W.U.L. Rev. 14, 56 (Fall 1992) ("There would be no point in having a trial if the conclusions arrived at can be overturned merely because

a subsequent reviewer disagrees with them."). Given these warnings from numerous sources, the guidance of this Court is now required to stem the tide of arbitrary judicial discretion in reviewing special jury verdict findings in civil cases.

In this case, the Seventh Circuit summarily rejected specific jury findings that Grace engaged in activities entitling it to statutory immunity from stale claims and then reexamined the same disputed facts to reach a contrary conclusion in violation of the Seventh Amendment guarantees. The jury, after hearing the evidence and weighing the conflicting arguments, found that Grace (in addition to manufacturing and supplying the fireproofing material) provided "design, planning, supervision, observation or management of construction services" with respect to this particular building construction. The jury's verdict confirmed that Grace's involvement met precise job-specific activities enumerated in the Illinois statute of repose which qualify it as a member of the protected class of defendants.[10] Yet, without so much as articulating a standard of review, the Seventh Circuit perfunctorily disregarded those findings as a "red herring" and reached its own contrary findings of fact. It posited that Grace "merely supplied bags of Monokote" to State Farm and decided, in its view, that Grace's activities could not be "reasonably interpreted" as those set forth in the statute or found by the jury. [A-4].

Consistent with the Seventh Amendment's right to trial by jury, Grace spent fifty trial days rebutting State Farm's case and presenting its own, to obtain a jury verdict in its favor on the dispositive statute of repose defense and on three of four

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[10] *See, e.g., Kleist v. Metrick Electric Co.*, 571 N.E.2d 819, 822 (Ill. App. 1991) ("[The statute] protects on its face anyone who engages in enumerated activities. [Defendant] engaged in the protected activities and, thus, is within the protected class.").

liability claims. Such effort and the jury's resulting verdict cannot be blithely set aside as a "red herring" or ignored completely by the courts of appeal without raising serious questions about the Seventh Amendment's vitality. The precedents of this Court and principles underlying the Seventh Amendment's right to trial by jury require that reviewing courts defer and give effect to the jury's special verdict findings of fact if supported by the evidence. *See Lavender v. Kurn*, 327 U.S. 645, 653 (1946) (where there is an evidentiary basis for the jury's verdict, the reviewing court's function "is exhausted ... it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable"); *see also Warner v. Kewanee Machinery & Conveyor Co.*, 398 U.S. 906 (1970) (Black, J., dissenting) ("questions of the sufficiency of the evidence are for the jury -- not the trial judge or the appellate court").

Despite the Court's pronouncements that appellate courts must construe the evidence to favor the jury's verdict, the appellate court here did just the opposite. By engaging in *de novo* determination of ultimate facts, the Seventh Circuit ignored black-letter standards of appellate review and rendered hollow the Seventh Amendment's protections of right to trial by jury without reexamination of the facts tried by the jury. The Court should grant certiorari in this case to reaffirm the constitutional proscriptions on appellate court fact-finding in derogation of jury verdicts and to set forth clear guidelines for reviewing jury verdicts consistently with the Seventh Amendment.

Moreover, in addition to reexamining the facts decided by the jury and reaching contrary fact conclusions with respect to Grace's affirmative defense of repose immunity, the Seventh Circuit nullified the majority of the jury's verdict. In finding that none of the activities of Grace in relation to this construction project were of the kind that would warrant the protection of the statute, the court drew inferences from the

jury's single negligence finding against Grace without acknowledging or harmonizing its analysis with the rest of the verdict or the record as a whole. The court simply speculated that the negligence finding could not have been based on Grace's construction-related activities. [A-5]. In *Gallick, supra*, 372 U.S. 108 at 119, this Court held that the appellate courts have a duty under the Seventh Amendment to attempt to harmonize special verdict interrogatories for consistency. *See also Atlantic & Gulf Stevedores, Inc., supra*, 369 U.S. 355 at 364 ("Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's findings inconsistent results in a collision with the Seventh Amendment").

When it inferred that the negligence finding could not have been related to Grace's job-specific activities, the Seventh Circuit chose to ignore the jury's verdict in its entirety. The jury found in its verdict that Grace did engage in "design, planning, supervision or observation of construction services related to installation ... in addition to supplying bags of ... fireproofing." In addition, the jury rejected State Farm's strict liability claim, finding that the Monokote fireproofing was not defective nor unreasonably dangerous. [L-2; L-10-14].[11] The jury also found

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[11] The appellate court's failure to even acknowledge the jury's finding absolving Grace from liability under State Farm's strict liability theory results in a Catch-22: had Grace been found liable for the manufacture of a defective and unreasonably dangerous product, it is certain that the Seventh Circuit would have pointed to that jury finding as evidence that the negligence finding was premised on Grace's manufacturing activity which, in the courts view, would not warrant repose immunity. The jury's finding that Grace was not strictly liable in the design and manufacture of Monokote is more consistent with the jury's finding of negligence as based on job-specific activities.

that State Farm was negligent and responsible for part of its own damages. [L-1]. State Farm argued that Grace should be held liable for its construction activities, *see* n.4, *supra*; and, on its negligence claim, State Farm received a continuing duty to warn instruction covering those activities.[12] Any attempt on the part of the Seventh Circuit to harmonize the entire verdict and record would have prevented the court from concluding, as it did, that the jury's negligence verdict could only have been related to Grace's "remote" manufacturing activity. The verdict as a whole is consistent with the opposite conclusion. The Seventh Circuit's disregard of co-equal findings of fact for Grace and its sole focus, albeit speculative, on the presumed evidentiary basis for the jury's negligence finding rendered the vast majority of jury's verdict in this case to be a complete nullity.

In short, this Court should not permit erosion of the Seventh Amendment through the avenue of appellate court selective reexamination of facts and speculative forays into the jury's thinking process. As the only court with authority to review and remedy infringements of Constitutional rights and principles flowing from opinions by federal courts of appeals, the Court should grant certiorari to ensure that federal courts respect and follow a jury's determination of disputed issues of material fact. Absent review, courts of appeal may continue to disregard jury's verdicts as distractions, construe the facts regardless of the jury's verdict to comport with their own characterization of the evidence, and speculate as to jury thought processes by recognizing and respecting only selected portions of the verdict and record.

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[12] The district court, over Grace's objection, instructed in its negligence charge that: "If W.R. Grace knew or should have known at the time it sold Monokote-3 to State Farm that its product was hazardous, then W.R. Grace was under a continuing duty to communicate such knowledge to State Farm." [L-6].

II. THE COURT SHOULD GRANT CERTIORARI TO AFFIRM THE EQUAL PROTECTION AND DUE PROCESS GUARANTEES OF THE FIFTH AND FOURTEENTH AMENDMENTS IN FEDERAL COURT APPLICATION OF STATE STATUTES.

The Equal Protection Clause of the Fourteenth Amendment guarantees that similar-situated individuals will be treated similarly by the government. It provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., Amend. XIV.[13] In applying a state statute, this Court has often stated that the federal courts must abide by the "construction placed upon it by the state court." *Bandini Petroleum Co. v. Superior Ct.*, 284 U.S. 8, 18 (1931); *citing Lindsley v. Natural Carbonic Gas Company*, 220 U.S. 61, 73 (1911) ("it is necessary to inquire what construction has been put upon [the state statute] by the highest court of the state, for that construction must be accepted by the courts of the United States, and be regarded by them as a part of the provision when

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[13] The Equal Protection Clause of the Fourteenth Amendment applies to the federal government through the Fifth Amendment Due Process Clause which provides that "No person shall ... be deprived of life, liberty, or property without due process of law." *U.S. Const. Amend. V.* The Court's "approach to Fifth Amendment equal protection claims" is "the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975). The Illinois Constitution provides, in like measure, that "No person shall be deprived of life, liberty or property without due process of law nor be denied equal protection of the laws." *Ill. Const., Art. I, § 2.*

they are called upon to determine whether it violates any right secured by the Federal Constitution"); *see also Felder v. Casey*, 487 U.S. 131, 151 (1988), *citing Erie R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938) ("federal courts are constitutionally obligated to apply state law to state claims"). In this case, the Seventh Circuit ignored the dispositive pronouncements of the Illinois appellate courts with regard to the necessary scope of the Illinois construction statute of repose to meet the fundamental Constitutional requirements of equal protection.

Two years after the passage of the original Illinois statute of repose in 1965, the Illinois Supreme Court in *Skinner v. Anderson*, 231 N.E.2d 588 (Ill. 1967) declared the statute unconstitutionally narrow because of its "discriminatory" protections. *Id.*, at 591.[14] The court provided a simple, clear mandate to the Illinois legislature: to pass constitutional scrutiny in Illinois, the construction statute of repose may not protect only architects and contractors involved in improving real property; it must also extend equal protection to owners, manufacturers and suppliers of the building materials who might also be subject to claims of liability arising from defective improvements to real property:

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[14] The Illinois Supreme Court declared the original statute unconstitutional under the prohibition against special legislation: "The General Assembly shall not pass local or special laws ... granting to any corporation, association, or individual any special or exclusive privilege, immunity or franchise whatever." *Ill. Const., Art. IV, § 23* (revised in *Ill. Const., Art. IV, § 13*). Since *Skinner v. Anderson*, the court has confirmed that a special legislation defect under Illinois law equates to a violation of equal protection. *Skinner v. Hellmuth, Obata & Kassabaum, Inc.*, 500 N.E.2d 34, 36 (1986) ("the standards used to evaluate the special legislation under the Illinois Constitution are the same standards applicable to equal protection claims").

> [O]f all those whose negligence in connection with the construction of an improvement to real property might result in damage to property or injury to persons ... the [original] statute singles out the architect and contractor and grants them immunity...
>
> The arbitrary quality of the [original] statute clearly appears when we consider that architects and contractors are not the only persons whose negligence in the construction of a building or other improvement may cause damage to property or injury to persons. If, for example, four years after a building is completed a cornice should fall because the adhesive used was defective, the manufacturer of the adhesive is granted no immunity. And so it is with all others who furnished materials used in constructing the improvement. But if the cornice fell because of defective design or construction for which an architect or contractor was responsible, immunity is granted.

Id. at 591 (emphasis added).[15] The Seventh Circuit never

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[15] Other non-binding state Supreme Courts have followed *Skinner v. Anderson* and held that their state statutes of repose may not constitutionally exclude designers, manufacturers, or suppliers of building materials to construction projects while protecting other construction trades. *E.g., Pacific Indemnity Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 558 (Minn. 1977) ("we too can see no basis for including within the protection of the statute persons who construct or design improvements to real estate, and excluding other persons against whom third parties might bring claims should they incur injury, such as owners and material suppliers"); *Tabler v. Wallace*, 704 S.W.2d 179, 182 (Ky. 1985), *cert. denied* 479 U.S. 822 (1986) ("no rational basis exists" under a construction statute of repose that conferred "special privileges and immunities upon architects, engineers, and builders" only); *Philips v. ABC Builders,*

considered this mandate directed specifically to manufacturers and suppliers of building materials.

To remedy the unconstitutionally discriminatory "trade-status" defect identified by the Illinois Supreme Court in *Skinner v. Anderson*, the Illinois General Assembly revised the language and passed the current construction statute of repose. *See* Ill. Rev. Stat. Chapter 110, ¶ 13-214(b) (set forth in full, *supra* at p. 5). Rather than impermissibly protect only some potentially liable persons by trade status, the legislature passed a new statute that immunizes any person engaged in "design, planning, supervision, observation or management of construction, or construction of an improvment to real property.. ." from any claim brought in "tort, contract, or otherwise" after ten years from the allegedly wrongful act. *Id.* Since the passage of the revised statute, the Illinois appellate courts have soundly rejected attempts to construe the revised statute to exclude manufacturers and suppliers of building materials on the basis of trade status. Rather, those courts have made it clear that the Illinois statute is broad and inclusive so as to withstand Constitutional scrutiny.

Pointedly, in *Skinner v. Hellmuth, Obata and Kasabau, Inc.*, 135 Ill. App. 3d 765, 482 N.E.2d 155 (1985), the Illinois Court of Appeals specifically addressed whether the new statute covered manufacturers or suppliers of building materials. That court determined that the revised statute remained

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Inc., 611 P.2d 821 (Wyo. 1980) ("no rational or reasonable justification for granting this immunity to this limited class of persons"); *Kallas Millwork Corp. v. Square D Corp.*, 225 N.W.2d 454, 459 (Wis. 1975) (same). Other courts have not followed the Illinois Supreme Court's decision in *Skinner v. Anderson*. *See, e.g. Zapata v. Burns*, 542 A.2d 700, 709 (Conn. 1988); *Whiting-Turner Contracting Co. v. Coupard*, 499 A.2d 178, 186 (Md. App. 1985).

unconstitutional because the new statute on its face does not explicitly include suppliers of building materials:

> The former statute singled out the architect and contractor from those categories of persons whose negligence in the construction of an improvement to real property may cause injury or damage to others; it gave no similar immunity to suit ... to the owners or person in control or to those who may furnish materials used in constructing the improvements. In the present statute, the only additions to the classes of persons who will be immune from suit ... are those who engaged in the "observation or management of construction." Again, the material provider whose product was defective causing injury or damages has no immunity as in the former statute.

Id. at 159-60 (emphasis added). However, rejecting that narrow reading on review, the Illinois Supreme Court reversed the Court of Appeals' ruling and held the revised statute comported with its earlier mandate and does not deny equal protection because: "the current statute does not exclude persons based upon their status. It protects, on its face, anyone who engages in the enumerated activites." *Id.*, 500 N.E.2d 34, 37 (Ill. 1986). *See also Continental Ins. Co. v. Walsh Const. Co.*, 171 Ill. App. 3d 135, 139, 524 N.E.2d 1131, 1135-36 (1988) (rejecting argument that the construction statute of repose "limits the liability of builders" but does not give "protection to owners and suppliers ...").

Thus, the Illinois statute of repose has been thorougly critiqued, amended, construed, and applied by the Illinois appellate courts to require and provide broad repose protection to all persons whose acts or omissions might subject them to claims of liability for damages or injury arising out of improvements to real property. Manufacturers and suppliers of

prototypical building products (such as code-required and extensively applied fireproofing materials) are necessary members of the protected class under the edicts of the Illinois courts. Yet, in this case, the Seventh Circuit never addressed or considered the Illinois courts' explicit discussions of contractors, material manufacturers or suppliers as being necessarily protected like-situated parties - especially when engaged in job-specific activities beyond construction and supply of building materials themselves. Despite extensive briefing on the subject, the court simply chose not to address or consider any of the equal protection concerns at all.[16]

The facts were undisputed that Grace designed, constructed, and supplied the fireproofing used throughout the construction of the buildings at issue. Moreover, the jury specifically found that Grace did, in fact, engage in the additional job-specific activities which the district court had determined to be the genuine issue of material fact for trial on the repose defense. The Seventh Circuit ignored those facts and refused to give Grace the protections of like-situated parties - as required by the Illinois Supreme Court's pronouncements and as due Grace under the jury's verdict clearly showing Grace to be a member of the intended protected class.

Instead, the court held that Grace was not entitled to the immunity of the construction statute of repose because Grace's

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[16] State Farm never asserted that the statute of repose was unconstitutional - nor did Grace. However, to narrowly construe it to exclude the very parties the Supreme Court of Illinois had discussed as being necessarily included - i.e. manufacturers and suppliers of building materials - renders the statute unconstitutional in its application. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (neutral law may violate equal protection guarantees if applied in a discriminatory manner). No Illinois appellate court has so applied the statute.

construction-related activities did not elevate it to the status of "designer or builder." [A-4-5]. In imposing such a test to be protected under the repose statute, the court skirted three decades of judicial and legislative history which has rejected as unconstitutional a trade-status standard for application of the Illinois repose statute and which has construed the current statute as necessarily protecting manufacturers and suppliers of building materials. The Seventh Circuit further eroded the protections of the Illinois statute of repose by concluding that even if Grace was akin to a "designer or builder," the statute would not extend to product liability claims arising out of acts "remote from building construction". [A-5]. Under its view, the suppliers' and manufacturers' mandated right to equal protection from liability, as explicitly directed by the Illinois Supreme Court in *Skinner v. Anderson*, has now been eliminated by a "remoteness" exception created without state precedent by the federal court of appeals.

Finally, confronting the undisputed fact that Grace designed, tested, manufactured and supplied the fireproofing for this construction project, the court acknowledged: "[if] the Monokote itself is an improvement it unquestionably was an improvement designed and constructed by Grace, so Grace would be home free." [A-5-6]. The court also recognized that the Illinois Supreme Court "has defined improvement so broadly in terms of a list of criteria ... as to bring the Monokote sprayed onto the structural steel within the semantic, if not necessarily intended, reach of the definition." [A-6]. Yet, remarkably, the Seventh Circuit flatly refused to apply the Illinois Supreme Court's already established criteria for "improvement" under the statute. Instead, the fireproofing is simply characterized as a "spray" - a "standard product incorporated into the improvement, or into the underlying building being improved" - which, the court decided, does not qualify as an improvement. [A-6-7]. Its characterization of the Monokote fireproofing as a mere "spray" and, thus, not an improvement, is not only factually unsound and

not grounded in the record;[17] it is contrary to the well-settled Illinois law that the repose statute encompasses components and constituent elements of improvements to real property.[18]

Had the court had employed, as it must, the criteria established by the Illinois highest court (i.e. permanency, integral component, enhancement of value and of use), there could be no doubt that the thousands of pounds of fireproofing bonded to the internal building structures over two decades ago

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[17] The Monokote fireproofing was applied by trained specialists to permanently bond to steel surfaces throughout the commercial office buildings' structural framework of girders, columns, and decking. The building codes required fireproofing systems, and building permits and occupancy certificates would not be issued without receiving inspection of the fireproofing. The fireproofing material was supplied to fill direct orders for each construction project and Grace consulted with the architect and contractor on the job site regarding installation and performance problems during construction - as the jury explicitly found. Finally, all of State Farm's claims arose from and depend on its allegations of property damage and resulting building rehabilitation expenses due to the suggested defective and unsafe condition of the fireproofing as an integral and extensive improvement to its real estate.

[18] *See St. Louis v. Rockwell Graphic Systems*, 605 N.E.2d 555 (Ill. 1992) (relevant criteria for what constitutes an "improvement to real property" include: whether meant to be permanent or temporary, became integral component of overall system, value of property increased, and use of property enhanced"); *see also Kleist v. Metrick Electric Co.*, 571 N.E.2d 819 (Ill. App. 1991) ("to artificially extract each component from an improvement to real property and view it in isolation would be an unrealistic and impractical method of determining what is an improvement to real property ... if a component is an essential or integral part of the improvement to which it belongs, then it is itself an improvement to real property").

during initial construction to meet code requirements qualifies the fireproofing as an improvement. The Seventh Circuit's idiosyncratic analysis again renders the statute's application unconstitutional and the Illinois Supreme Court's own analysis of its broad and nondiscriminatory scope a nulllity in federal diversity cases.

If the Seventh Circuit's radical reconstruction of Illinois law to avoid application of repose immunity to Grace in this case is permitted to stand without Supreme Court scrutiny, then the equal protection guarantees of the Federal Constitution, as already enunciated and applied to the subject statute by the highest court of Illinois, will have been rendered expendable to the caprice of judicial legislation. Under the facts brought out in fifty days of trial, if the repose protections of the Illinois statute are denied this defendant, then Illinois statutory and appellate court law has been set back twenty-five years and no manufacturer or supplier can qualify for protection.

In short, the court's adoption of trade-status tests that only architects or builders can meet directly contradicts the Illinois Supreme Court's pronouncements that, to be consistent with the guarantees of equal protection, the statute must (and does) protect any defendant that engaged in any of the enumerated activities associated with improving real property and that constituent parts of an improvement are encompassed within the statute's immunity protection of all those whose efforts have contributed to the improvement. The Seventh Circuit's unequal treatment denied Grace the equal statutory immunity protections consistently afforded similarly-situated parties and required by the forum state's highest court to extend to all those potentially subject to liability for allegedly defective and unsafe real property improvements. This Opinion simply reinstates, through federal appellate court construction, the

original trade-status-based statute declared unconstitutionally discriminatory by the Illinois Supreme Court two decades ago.[19]

Judicial legislation by federal courts should not be encouraged in diversity matters but it must be prohibited where the judicially created state law has already been rejected by the forum state's highest court. The Court should grant review to fulfill the promises of equal protection and due process guaranteed by the Constitution in the application in diversity actions of state law. Absent review, courts of appeal may continue to ignore state appellate court pronouncements on the construction of their own state's statutes so as to exclude classes of parties which must be included to apply the statute consistent with the Constitution.

CONCLUSION

The message of the Seventh Circuit's Opinion in this case sounds numerous Constitutional alarms. Federal district and appellate courts should not be permitted to discard unchallenged jury verdicts with which they disagree and re-examine the same facts *de novo*. Jury trials mean little if the Seventh Amendment so allows. Appellate courts should consider the entire record, respect and harmonize the entire verdict, and avoid speculative and one-sided excursions into their own view of the rationale for the jury's verdict. The Seventh Amendment's mandate so demands. In addition, the federal appellate courts must follow the constructions and Constitutional mandates of the forum state's highest court when

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[19] Rather than base an entire statutory construction on unsupported presumptions of the Illinois state legislature's "evident intent" and the intent of the Illinois Supreme Court's parameters for the sweep of the statute [A-4], the federal appellate court should have certified the issue to the state's highest court. Ill. Sup. Ct. Rule 20; Seventh Circuit App. R. 52.

applying state statutes and must avoid presumptions of legislative intent, especially where inconsistent with the state appellate courts' pronouncements. Otherwise, fashioning of state legislation by federal appellate courts exercising their reviewing authority threatens principles of sovereignty and due process - and, in this case, violates equal protection guarantees of the Fourteenth Amendment.

Accordingly, Grace respectfully requests the Supreme Court issue a Writ of Certiorari to review the critical Constitutional issues raised by this case. Ultimately, Grace seeks reversal of the Seventh Circuit with an order for entry of judgment dismissing State Farm's negligence claim under the immunity of Illinois' construction statute of repose consistent with the jury's verdict on that issue and with the Illinois Supreme Court's pronouncements of the Constitutionally-mandated scope of the statute's protections.

Respectfully submitted,

Dated: 8/12/94

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In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 93-3685

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff-Appellee,

v.

W.R. GRACE & COMPANY-CONN.,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 89-3022-**Richard Mills**, *Judge*.

ARGUED APRIL 5, 1994-DECIDED MAY 17, 1994

Before POSNER, *Chief Judge*, BAUER, Circuit Judge, and ASPEN, District Judge.*

*Hon. Marvin E. Aspen of the Northern District of Illinois.

POSNER, *Chief Judge.* In 1963 W.R. Grace & Company became the manufacturer of "Mono-Kote", fireproofing material, a dry mixture of vermiculite, gypsum, and asbestos packed and sold in 50-pound bags to construction companies. At the construction site a contractor or subcontractor would mix the Mono-Kote with water and spray the mixture on structural steel to fireproof it. In the early 1970s, State Farm Insurance Company built a corporate head-quarters and two other buildings. The architect's plans specified "cementitious" fireproofing, of which Mono-Kote was a prominent brand. The contractors bought and used Mono-Kote for the fireproofing of the buildings. Ten years later State Farm discovered large quantities of airborne asbestos fibers in the three buildings and undertook a costly program to remove the Mono-Kote. Later State Farm brought this diversity tort action against Grace, charging that Grace had failed to warn State Farm that Mono-Kote contained asbestos and had not tested the product adequately before sale. The very use of asbestos in Mono-Kote, State Farm charged, was gratuitous because Grace had developed an asbestos-free variant (Mono-Kote 4) that worked just as well and cost only a little more. Grace had failed to sell State Farm Mono-Kote 4 only because it was trying to unload its inventory of the old Mono-Kote (Mono-Kote 3) and because the price of Mono Kote 4 was limited by price controls. (Eventually Grace did begin supplying Mono-Kote 4 for the State Farm building projects.) The suit charged negligence and breach of warranty. The district judge held the warranty claim time barred but allowed the negligence claim to go to the jury, the Supreme Court of Illinois having relaxed the "economic loss" rule in asbestos cases. *Board of Education v. A, C & S, Inc.*, 546 N.E.2d 580, 585-90 (Ill. 1989). The jury found that Grace had been negligent, and, after a reduction in the verdict by reason of State Farm's

contributory negligence, judgment was entered for $12.5 million.

The only issue raised on appeal is whether State Farm's suit is barred by the Illinois Design and Construction Statute of Repose, which bars any tort suit "brought against any person for any act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property[,] after 10 years have elapsed from the time of such act or omission." 735 IL CS 5113-214(b). If that is the character of Grace's act or omission, the suit is indeed barred. The judge thought not, 834 F. Supp. 1052, 1056-61 (C.D. Ill. 1993), but propounded the following special interrogatory, which the jury answered "Yes": "Did W.R. Grace provide design, planning, supervision, observation or management of construction services related to installation of fireproofing to State Farm Mutual Automobile Insurance Company in addition to supplying bags of Monokote 3 and Monokote 4 fireproofing?"

The special interrogatory is a red herring. (Why it was asked eludes us.) It embellishes the statute with the expansive term "services" and brings in Grace's activities with regard to Mono-Kote 4, which is not the product on which the suit is based. The few visits that employees of Grace made to the building sites occurred, with one possible exception, after the Mono-Kote 3, the product in suit, had been sprayed on. Grace did not supervise the spraying.

The original version of the statute was invalidated as "special legislation," mainly because it excluded from its protection owners or occupiers of the property on which the building was being built or the improvement being made. *Skinner v. Anderson*, 231 N.E.2d 588 (Ill. 1967). So the

legislature amended the statute to knock out the exclusion. The revised statute was upheld in *People ex rel. Skinner v. Hellmuth, Obata & Kassabaum, Inc.*, 500 N.E.2d 34 (Ill. 1986), where the court remarked that the revised statute "does not exclude persons based upon their status" but instead protects anyone who engages in the enumerated activities." *Id.* at 37 (emphasis in original). Grace fastens on this language, arguing that the fact that it is a manufacturer rather than a designer, builder, etc. does not exclude it from the statute's protection. That is true but the activities in which it engaged in relation to the Mono-Kote 3 used in the construction of State Farm's three buildings are not reasonably interpreted as design, supervision, observation, planning, etc. Grace did not spray the structural steel in the buildings with a mixture of Mono-Kote and water. It merely sold bags of Mono-Kote for application by a contractor or subcontractor at the building site.

The bags came with instructions. Most products do. If including instructions with the delivered product makes a supplier a designer or builder, then virtually every supplier of building materials is protected by the statute of repose despite the legislature's evident intent to circumscribe its protection far more narrowly-in fact as narrowly as the Supreme Court of Illinois would permit. Grace points us to a letter from a subcontractor to the contractor for one of the buildings requesting approval for the use of Mono-Kote as the material for fireproofing the building. Enclosed are a "To Whom It May Concern" letter from Grace certifying that the Mono-Kote to be supplied to the subcontractor complies with Underwriters' Laboratories specifications and a printed brochure describing Mono-Kote, explaining how it should be installed, and reciting its Underwriters' Laboratories ratings. Grace argues that the subcontractor followed these directions to a T and we may assume that it did, but we do not see how

that turned Grace into a designer or builder. Every product used in the construction of a building has attributes that constrain its use, hence "specifications" express or implied for that use. If this is enough to make the supplier of the product a delegate of the architect, furnishing design specifications that otherwise the architect himself would have to furnish, the statute will embrace every supplier of building materials. Surely that was not intended.

Even if all this is wrong and the printed brochure made Grace a designer or builder of State Farm's buildings, Grace would still lose. Its negligence had nothing to do with the installation or application of the Mono-Kote. So far as appears, the directions for the installation of the product were perfectly adequate and it could not have been installed better. The problem was in the design of the Mono-Kote (to include asbestos), the failure to test the product, and the failure to warn about it. These negligent acts or omissions being remote from building construction were not the sort of activities that the statute was intended to shield from late-filed products liability suits, as the California courts have held in interpreting a materially identical statute. *Baker v. Walker & Walker, Inc.*, 184 Cal. Rptr. 245,251 (App. 1982). Grace itself emphasizes that the statute protects activities rather than particular persons. *People v. Asbestospray Corp.*, 616 N.E.2d 652,657 (Ill. App. 1993); *C.S. Johnson Co. v. Champaign National Bank*, 467 N.E.2d 363, 365 (Ill. App. 1984). It protects none of the activities that the jury could have found to be tortious.

But our analysis is incomplete. We have been focusing on the meaning of designing, planning, constructing, etc. the building, but the statute also embraces the designing, planning, constructing, etc. of improvements to the building. If the Mono-Kote itself is an improvement it unquestionably

was an improvement designed and constructed by Grace, so Grace would be home free. Of course calling a spray an "improvement" would do violence to the ordinary meaning of the word when it is used in the context of construction, as well as impart a breathtaking scope to the statute. An extension to a kitchen is an improvement; the paint on the extension is not. But the Supreme Court of Illinois, whose interpretation of the statute's meaning we are trying to predict, has defined improvement so broadly in terms of a list of criteria such as whether "the addition was meant to be permanent or temporary" and "whether it became an integral component of the overall system," St. Louis v. Rockwell Graphic Systems, Inc., 605 N.E.2d 555,556 (Ill. 1992) -- as to bring the Mono-Kote sprayed onto the structural steel in State Farm's buildings within the semantic, if not necessarily the intended, reach of the definition.

The *St. Louis* case involved a printing press, and the court remanded for a determination whether, given the cost of the press, its size, and the building modifications if any required for its installation, it was an improvement. Our decision in *Hausman v. Monarch Machine Tool Co.*, 997 F.2d 351,354-55(7th Cir. 1993), interpreting the Illinois statute, found that a 150-foot-long machine for annealing steel, the installation of which had required raising the roof of the factory, was an improvement to the factory building. *Witham v. Whiting Co.*, 975 F.2d 1342, 134~7 (7th Cir. 1992), reached the same conclusion with regard to a stationary crane that had been custom-designed to fit into the building where the accident occurred. Each of these cases involved a palpable improvement; it does not follow that a standard product incorporated into the improvement, or into the underlying building being improved, is also an improvement. *People v. Asbestospray Comp., supra*, 616 N.E.2d at 657-58, holds, correctly in our view, that it is not. See also *Hilliard v.*

Lummus Co., 834 F.2d 1352, 1357(7th Cir. 1987); *Corbally v. W.R. Grace & Co.*, 993 F.2d 492(5th Cir. 1993); *Baker v. Walker & Walker, Inc., supra*, 184 Cal. Rptr. at 250; *Sevilla v. Steams-Roger, Inc.*, 161 Cal. Rptr. 700, 702 (App. 1980). No case extends the concept of improvement to a spray.

The judgment for State Farm is

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
June 16, 1994
Before
Hon. Richard A. Posner, Chief Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. Marvin E. Aspen, District Judge*

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *Plaintiff-Appellee,*	) Appeal from the United) from the Central District) of Illinois,))
v.	) Springfield Division) No. 89-3022
W.R. GRACE & COMPANY - CONN.,	) No. 93-3685) Richard Mills, Judge)
Defendant-Appellant.	))

ORDER

On May 31, 1994, defendant-appellant filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

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* Hon. Marvin E. Aspen of the Northern District of Illinois, sitting by designation.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., Plaintiff,

v.

W.R. GRACE & CO., Defendant

No. 89-3022.

United States District Court, C.D. Illinois, Springfield Division.

Oct. 26,1993.

OPINION

RICHARD MILLS, District Judge:

Asbestos property-damage litigation.

Fifty day trial conducted piecemeal from January to August 1993.

End result: jury awards State Farm $17,889,632.47 damages, but also finds State Farm thirty percent negligent.

Now before the Court, W.R. Grace's motions:

(1) to dismiss all claims as untimely filed under the Illinois Construction Statute of Repose;

(2) for new trial;

(3) for judgment after trial.

I. *Background*

State Farm brought this action to recover the costs of management, removal, and replacement of W.R. Grace's asbestos containing fireproofing, Monokote-3 (MK3), from State Farm's corporate headquarters in Bloomington, Illinois, and its regional office buildings in Tempe, Arizona and Austin, Texas. Construction of the three buildings took place between 1970 and 1973. State Farm originally sought damages based on the legal theories of strict liability, negligence, fraudulent misrepresentation, and willful and wanton misconduct. State Farm's total prayer for compensatory damages for the three buildings was $34,494,483.23. State Farm also sought punitive damages from W.R. Grace.

State Farm's negligence Count averred that asbestos was not necessary in MK3 and that when W.R. Grace was forced to discontinue sales of MK3 in light of regulations promulgated by the Environmental Protection Agency, it replaced the asbestos with shredded paper fiber. State Farm also alleges negligence because W.R. Grace never placed any warnings on MR3, despite the fact that W.R. Grace had knowledge of the harms of asbestos from: (a) its operation of an asbestos-contaminated vermiculite mine and MR3 production facilities (where workers were getting sick); and (b) its involvement in the late 1960's with the public health debate on asbestos. Despite this knowledge, State Farm alleges that W.R. Grace continued to sell MK3 until the federal ban in July 1973, even though W.R. Grace had developed a non-asbestos Monokote in 1970 and was selling it elsewhere.

W.R. Grace denied liability under any legal theory. In addition, W.R. Grace raised the following affirmative

defenses: statute of limitation, Illinois Statute of Repose, state of the art, misuse, comparative negligence, and assumption of the risk.

W.R. Grace took the position that the harms from in-place asbestos are greatly overstated. Specifically, W.R. Grace alleged that documents produced by State Farm revealed that airborne asbestos fiber levels in their buildings were well within and below any applicable government standard, demonstrating that W.R. Grace's fireproofing should not be removed and could be managed with an effective operation and maintenance program.

Jurisdiction of this Court was invoked under 28 U.S.C. § 1332.

The trial was bifurcated. On May 11, 1993, the jury returned a verdict on the liability phase of the trial. The jury returned a verdict of guilty on State Farm's Count of negligence and not guilty on State Farm's Counts of fraud, strict liability, and willful and wanton conduct. In addition, the jury found that State Farm was 30 percent contributorily negligent.

On August 26, 1993, the jury returned a verdict on the damages phase of the trial. The jury assessed State Farm's damages to be $17,889,632.47.

After the verdict, W.R. Grace moved for judgment as a matter of law claiming that this suit should be barred because of the Illinois Statute of Repose and the fact that the jury verdicts were inconsistent. W.R. Grace also seeks a new trial for a host of procedural and substantive issues.

II. Motion for Judgment as a Matter of Law

(A). Statute of Repose

The Illinois Construction Statute of Repose states that:

> No action based upon tort, contract, or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation, or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission.

Ill.Rev.Stat, ch. 110, ¶13-214(b).

Because State Farm's buildings were constructed between 1970 and 1972 and this suit was not brought until 1989, W.R. Grace claims that the ten-year repose limit in this statute has expired and the suit should be barred.

1. Procedural History

This marks the fifth time that the Court has considered whether W.R. Grace is protected by this-statute. On January 3,1993, the Court denied W.R. Grace's motion for summary judgment on this issue. At that time, the uncontested evidence present in the record supported the finding that W.R. Grace was a "mere manufacturer" of asbestos materials. This distinction was important, we noted, because of the dicta in *Witham v Whiting Corp.*, 975 F.2d 1342, 1346-47(7th Cir.1992). *Witham* was the only Seventh Circuit opinion at that time which addressed the issue.

In *Witham*, the plaintiff sued under theories of strict products liability and negligence when he was struck by a girder attached to a 40-ton main hoist crane manufactured by the defendant. The Court noted that "[t]here may be a problem with applying the improvement to real property statute of repose to a manufacturer of a product used in the improvement who was otherwise uninvolved with the particular construction project." *Id.* at 1346. In addition, the court stated that the applicable legislative history did not extend the statute to protect the manufacturer of products.[1] However, this dicta was not dispositive-- by its own terms.[2] *Witham* conceded that the Illinois Supreme Court must eventually resolve the issue. However, despite the disclaimer, the court found that defendant was not a mere manufacturer ("It did not simply pluck the crane from its inventory and ship it to Allied. Instead, it specially manufactured the crane for Allied based on information Allied provided about its plant." *Id.* at 1347.) and extended the statute of repose to protect the defendant.

Despite the forecast in *Witham*, Illinois Supreme Court did not resolve the issue. As a result, on January 15, 1993, this Court denied W.R. Grace's motion for interlocutory

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[1] "We note that Section 13-214 is titled 'Construction-Design management and supervision,' and the legislative history of that section indicates that its purpose is to protect architects, construction companies, engineers, and the like." (citing 81st Ill.Gen.Assem., House Proceedings. May 25, 1979. at 34).

[2] *Witham* found that the Appellate Court of Illinois rejected an argument that a manufacturer does not fall within the class of defendants intended to be protected by the statute of repose. *St. Louis v. Rockwell Graphic Systems, Inc.*, 220 Ill.App.3d 704, 710, 163 Ill.Dec. 142, 148, 581 N.E.2d 93, 99 (1991).

appeal. At issue was whether the Illinois Supreme Court opinion in *St. Louis v. Rockwell Graphic Systems*, 153 Ill.2d 1, 178 Ill.Dec. 761, 605 N.E.2d 555 (1992), superseded the analysis of *Witham*. With the question of whether manufacturers are included within the statute of repose before it, the Illinois Supreme Court remanded the case back to the trial court for a determination of whether the equipment in question (a printing press) was an improvement to real property. As a result, this Court denied W.R. Grace's motion for interlocutory appeal because neither party submitted evidence on the issue of whether the asbestos was an improvement to property.

On April 22,1993, the Court denied W.R. Grace's motion for judgment as a matter of law. The court found that the statute of repose issue was extremely close and would be determined by the extent to which W.R. Grace's involvement met the statutory threshold of "design, planning, supervision or observation." We noted that at least one federal court in our circuit had excluded asbestos manufacturers from protection under the statute of repose.[3] Nevertheless, we waited for a definitive ruling from the Seventh Circuit or the Illinois Supreme Court.

Finally, on May 26, 1993, we denied W.R. Grace's motion for judgment as a matter of law after the liability portion of the trial on this issue. We invited the parties to address two issues in post-trial motions: (1) the legislative history behind the statute of repose (was the statute intended to protect only those who perform professional design and construction activities?); and (2) statutory construction (does the statute of repose protect only claims arising out of

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[3] *Heider v. W.A. Grace*, 815 F.Supp. 1137 (N.D.Ill.1993).

"design, planning, supervision, or observation," of the defendant, or all claims?).

2. *Legislative and Judicial History*

[1] Contrary to *Whitham's* suggestion that the legislative history of the statute of repose protects a class of defendants (architects, engineers, and the like) and excludes another class (manufacturers of products), we find that the statute of repose does not exclude persons based upon their status. Rather, the pivotal issue is whether the defendant engages in the enumerated activities (i.e., was the defendant engaged in the "design, planning, supervision, observation, or management of construction," Ill.Rev.Stat. ch. 110, ¶ 13-214); *Hausman v. Monarch Machine Tool Co.*, 997 F.2d 351, 353-54 (7th Cir. 1993) ("'[m]ere labels are not dispositive' and section 13-214 protects, on its face, anyone who engages in the enumerated activities." (citations omitted)).

Originally, the statute of repose was drafted to protect only certain design professionals or contractors.[4] Ill.Rev.Stat. ch. 83, § 24f (1965). This statute was struck down as unconstitutional in 1967. *Skinner v. Anderson*, 38 Ill.2d 455, 231 N.E.2d 588 (1967). In *Skinner*, the court held that section 29 of the Limitations Act (the predecessor to § 13-214) was unconstitutional as special legislation because it protected architects and contractors from untimely lawsuits, but not others, such as owners, tenants or manufacturers of materials used in construction:

> The arbitrary quality of the statute clearly appears when we consider the architects and contractors are not the only persons whose negligence in the construction of a building or other improvement may cause damage to property or injury to persons. *If for example, four years after a building is completed a cornice should fall because the adhesive used was*

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[4] The original statute of repose stated:

> No action to recover damages for any injury to property, real or personal, or injury to the person, or for bodily injury or wrongful death, arising out of the defective or unsafe condition of an improvement to real estate, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, supervision of construction, or construction of such improvement to real property, unless such cause of action shall have accrued within four years after the performance or furnishing of such services and construction. This limitation shall not be available to any owner, tenant or person in actual possession and control of the improvement at the time such cause of action accrues.

> *defective, the manufacturer of the adhesive is granted no immunity. And so it is with all others who furnish materials used in the constructing the improvement. But if the cornice fell because of defective design or construction for which an architect or contractor was responsible, immunity is granted.*

Id. at 38 Ill.2d at 459-60, 231 N.E.2d at 590-91. (Court's emphasis).

[2] W.R. Grace argues that the above quotation demonstrates that the Illinois Supreme Court intended a manufacturer of a basic construction material (adhesive) to be protected under the statute of repose. The Court does not agree. The Court's conclusion is evident from the subsequent history of the statute. In 1979, the Illinois legislature passed a new statute of repose. The legislature eliminated the exclusivity language of the original statute and expanded the protection from untimely lawsuits to "any person, who, ten years or later, is accused of wrongful acts or omissions related to an improvement to real property.

This statute was again struck down by the Illinois Appellate Court in *People ex rel. Skinner v. Hellmuth, Obata & Kassabaum, Inc.*, 135 Ill.App.3d 765, 90 Ill.Dec. 448, 482 N.E.2d 155 (1985) (*Hellmuth I*). After citing the language of § 13-214 which protects "design, planning, supervision, observation or management of construction or construction of an improvement to real property" (90 Ill. Dec. at 450, 482 N.E.2d at 157), the panel recognized "again, the material provider whose product was defective causing injury or damages has no immunity . . ." *Id.* at 452-53, 482 N.E.2d at 159-60. The court believed that the exclusion of materialmen (and owners of property) from protection was unconstitutional.

However, on appeal, the Illinois Supreme Court held that the legislative classification which concerned the appellate panel (exclusion of owners and materialmen) was not unconstitutional. ***People ex rel. Skinner v. Hellmuth, Obata & Kassabaum, Inc.***, 114 Ill.2d 252, 102 Ill.Dec. 412, 500 N.E.2d 34 (1986) (***Hellmuth II***). The court deferred to the legislature which it said could constitutionally classify "construction activities separately from other activities." *Id.* 102 Ill.Dec. at 417, 500 N.E.2d at 38. More importantly for our application, ***Hellmuth II*** stated that the statute of repose did not include or exclude persons "based upon their status (e.g. architect, contractor, materialmen)." *Id.* 102 Ill.Dec. at 415, 500 N.E.2d at 37. Rather, the court ruled that the statute of repose protects only those who engage in the enumerated activities protected by the statute: design, planning, supervision, observation or management of construction." In this way, the court reasoned that a surety's issuance of a bond "cannot be deemed to be engaging in the 'design, planning, supervision, observation or management of construction, or construction . . ." *Id.* 102 Ill.Dec. at 417, 500 N.E.2d at 39.

The legislative history surrounding the statute of repose also supports the interpretation that only those "persons" engaged in the "enumerated" activities are protected. In the legislative debates on the House floor, Representative John Dunn stated that the legislation was intended to protect those who exercise individual judgment (with concomitant individual responsibility) during construction projects:

> This is a Bill that would provide a statute of limitations for claims against architects, engineers, consulting engineers, contractors and builders.

> . . .
>
> The purpose of this Bill is to provide some relief for professionals, who are trying to exercise their sound judgment in the design and construction of improvements to real property . . . so that they and their families are not liable all their lives and beyond lives and into the graves.

Eighty-First Illinois General Assembly, House Proceedings, May 25, 1979 at 10, 32.

However, when asked if the statute of repose "would apply to architects and contractors only," Mr. Dunn replied, "No. It would apply to the architect, the engineer, the contractor, *anyone* who was involved in the *planning, supervision, operation or management of construction* or the construction of an improvement to real property." *Id.* at 31 (emphasis added). At no time did the legislative history indicate that the statutory protections would specifically include or exclude the manufacturers of building products.

3. Analysis

[3] Thus, to be protected by the statute of repose, W.R. Grace must have participated in the "design, planning, supervision, observation or management of construction, or construction" and the construction that W.R. Grace took part in must constitute an "improvement to real property." *Herriott v. Allied Signal, Inc.*, 998 F.2d 487, 489 (7th Cir. 1993) (citing Ill.Rev.Stat. ch. 110, ¶ 13- 214(b)).

(a). "Enumerated activities"

The threshold level of construction-related activities that satisfy the statute of repose is not yet clear in Illinois law, or the law of our circuit. One Illinois Appellate Court recently stated that:

> To be included within the statute, a manufacturer must perform some role related to the construction site beyond provision of standard products generally available to the public and not custom designed for the project.

People v. Asbestospray Corporation, 247 Ill. App.3d 258, 186 Ill.Dec. 462, 467-68, 616 N.E.2d 652, 657-58 (1993).

However, *Asbestospray* does not assist this Court's analysis. In *Asbestospray*, the record was absent any evidence that the defendant had a role in the construction of plaintiff's building. Accordingly, the panel found that defendant was not entitled to the protection of the statute of repose. Therefore, without any evidence in the record, it is impossible to determine what threshold of construction-related activities would have satisfied the panel in *Asbestospray*.

[4] The Court finds the "activity analysis" formulated by the Missouri Supreme Court in *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822 (Mo. 1991) (*cited with approval in Herriott v. Allied Signal, Inc.*, 998 F.2d 487 (7th Cir.1993); *Witham v. Whiting Corp.*, 975 F.2d 1342 (7th Cir.1992); *Herriott v. Allied Signal, Inc.*, 801 F.Supp. 52 (N.D.Ill.1992)) is more helpful to this Court on this issue. Using the "activity analysis," manufacturers of products are protected by the statute of repose when they engage in "substantial participation at the construction site in significant

activities in installing or incorporating" their product into the real property or, alternatively, if they custom make their product away from the construction site specifically for a particular project *and* then install this product at the site. *Allied Signal*, 801 F.Supp. at 57-8 (quoting *Blaske*, 821 S.W.2d at 837-38) (Emphasis ours).

[5] The Court finds that W.R. Grace did not "custom design" and "install" the Monokote, nor "substantially participate" in the construction of State Farm's buildings. The evidence showed that the Monokote product was sold in bags to the contractor. The chemical composition of a bag of Monokote fireproofing did not change from job to job. The contractor (not representatives of W.R. Grace) then mixed the Monokote with water in the contractor's own equipment, and then applied the mixture to State Farm's buildings--again using the contractor's own equipment. At no stage in the construction process did W.R. Grace provide any equipment to the contractors installing the Monokote.

In addition, W.R. Grace's involvement in the construction process was minimal. The total cost of the Monokote product ($13,000) was minuscule when compared to the $23 million dollar cost of the construction project. W.R. Grace stated that it was their general policy to routinely meet with contractors to discuss mixing instructions, to check yields, and to assist in the proper application of the fireproofing. These types of services were expected by the customer. W.R. Grace also advised architects, based upon W.R. Grace's expertise in performing "blue-print takeoffs," on how to determine the fireproofing required to obtain a desired fire rating. However, W.R. Grace offered no evidence which quantified the amount of these services which were provided to State Farm. Indeed, no W.R. Grace representative ever attended the weekly State Farm construction progress

meetings. Mr. Egan, Manager of W.R. Grace's Mid-West Region, did visit the construction site (for one day) at State Farm's headquarters in Bloomington, Illinois to troubleshoot a problem with the building's curtain wall.[5] Aside from the visit of Mr. Egan, there is no other evidence that a representative of W.R. Grace assisted in the construction of State Farm's buildings.[6] Overall, the headquarters construction project was a 3 1/2 year job. At best, W.R. Grace representatives visited the job on a few isolated occasions (perhaps 4-5 days). This Court cannot find that such minuscule activities amount to "substantial participation."

(b). "Act or Omission"

[6] Second, this suit does not allege W.R. Grace was negligent in any of the "enumerated" activities (the "design, planning supervision, observation or management of construction, or construction of an improvement to real property . . . ." Ill.Rev.Stat. ch. 110, ¶ 13- 214) of the statute of repose. Instead, State Farm claimed W.R. Grace was negligent because: (1) asbestos was unnecessary in the manufacture and sale of Monokote; (2) W.R. Grace put no warning label on Monokote packaging or literature concerning the health hazards of asbestos; and (3) W.R. Grace conducted inadequate testing on the Monokote before sale. Because State Farm claims that W.R. Grace was negligent in its manufacturing-related activities, rather than its construction-

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[5] It is undisputed that W.R. Grace representatives did not visit the construction of the State Farm regional headquarters buildings in Tempe, Arizona and Austin, Texas.

[6] The visits of Mr. Bourke and Mr. Lyons (other agents of W.R. Grace) were not related to the construction or application of the Monokote.

related activities, State Farm argues that W.R. Grace is exempt from the statute of repose.

The Court agrees.

The proposition that manufacturers receive protection from the statute of repose only if they are sued for on-site construction activities appears in both Illinois judicial precedent and the legislative history of the statute of repose. In *Delta Verwaltungs Raf Gesellschaft Mit Beschrankter Hafung v. Kenneth Rowe*, 1985 W.L. 2055 at *1 (N.D.Ill. July 5, 1985), the plaintiff employed an architect to inspect a building that plaintiff intended to buy. The architect's inspection was negligent, resulting in plaintiff incurring additional expenses to fix damage that the architect missed. The architect moved for summary judgment arguing that he was protected by the statute of repose. *Delta* rejected this view, holding that even though defendant was an architect, plaintiff's cause of action did not arise out of the architect's failure to perform any of the enumerated acts of the statute of repose:

> There is no indication in the legislative history that Section 13-214(A) was to apply to all activities of the architects. Rather, the legislative history indicates that Section 13-214(A) applies only to those actions involving the planning, supervision, operation or management of construction, or construction of improvements to real property, and not to actions such as those described herein which are unrelated to construction.

Id., *McIntosh v. A. & M Insulation Co.*, 244 Ill.App.3d 247, 185 Ill.Dec. 69, 614 N.E.2d 203 (1993) (plaintiff with asbestos was not allowed to proceed against defendants on the

theory that defendants were sellers and distributors of asbestos containing products); *Asbestospray*, 247 Ill.App.3d at 262, 616 N.E.2d at 657 ("Other courts have determined that Section 13-214 of the Code would not apply to a landowner where the action is founded solely on the defendant's status as landowner . . . but would apply to a landowner being sued for his own act or omission in one of the specified construction-related activities"); *Hellmuth II*, 114 Ill.2d at 256, 102 Ill.Dec. at 416, 500 N.E.3d at 38 (surety not protected by statute of repose because plaintiff's claim arises out of breach of contract).

In addition, as mentioned above, Representative Dunn, a sponsor of the Illinois Statute of Repose Bill stated that the bill was intended to protect only suits against construction-related activities: "It [the bill] would apply to the architect, the engineer, the contractor, anyone who is involved in the planning supervision, operation or management of construction, or the construction of improvements to real property:" Transcript of House Debates, May 25, 1979, at 29-32.

(c). *Special Jury Question*

[7] Following the liability portion of this trial, at the request of W.R. Grace, the following special question was submitted to the jury:

> Did W.R. Grace provide design, planning, supervision, observation or management of construction services related to the installation of fireproofing to State Farm Mutual Automobile Insurance Company in addition to supplying bags of Monokote 3 and Monokote 4 fireproofing?

The jury returned an answer of "YES."

Nevertheless, the Court finds that this special question is without legal relevance. In *St. Louis v. Rockwell Graphic Systems, Inc.*, 153 Ill.2d 1, 178 Ill.Dec. 761, 762, 605 N.E.2d 555, 556 (1992), the court ruled that what constitutes the term "improvement" within the statute of repose is a question of law. This decision is tantamount to ruling that the interpretation of the statute of repose is a matter of law.

Accordingly, for the above reasons, the Court DENIES W.R. Grace's motion for judgment as a matter of law under the Illinois Statute of Repose.

(B). *Inconsistent Jury Verdicts*

[8] W.R. Grace also argues that judgment after trial is warranted because the jury verdict was inconsistent. First, at the end of the liability phase of the trial, the jury returned a partial verdict for State Farm on the issue of negligence. At this time, the jury also found W.R. Grace not guilty on the strict products liability Count. W.R. Grace argues that because State Farm's cause of action focused solely, on the manufacturing activities of W.R. Grace, the jury cannot find negligence without also finding against W.R. Grace on strict liability.

[9, 10] This argument is without merit. To begin with, W.R. Grace specifically waived any objections to the facial invalidity of the jury instructions at the jury instructions conference.[7] In addition, the jury could find that while the

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[7] Upon receiving the verdict in the liability phase, the following exchange between the Court and counsel transpired:

The Court: [d]o either of you see any conflict

product was not unreasonably dangerous, the manufacturer's conduct failed to meet the appropriate standard of care. This is because the negligence theory measures the reasonableness of the manufacturer's *conduct*, while strict liability measures whether the product was *defective*. *Davis v. FMC Corp., Food Processing Machinery Div.*, 771 F.2d 224, 230 (7th Cir. 1985) (citing *Kossifos v. Louden Machinery Company*, 22 Ill.App.3d 587, 591, 317 N.E.2d 749 (1974)).

[11] Second, W.R. Grace argues that the jury verdict was inconsistent because the finding that State Farm was 30 percent contributorily negligent is inconsistent with the jury's finding that State Farm did not know about its cause of action until 1986. In other words, W.R. Grace argues that the jury must have found State Farm negligent at the time of sale and therefore knew of its claim at the time of sale. W.R. Grace offers no authority to support this position. Moreover, as stated above, this argument was waived by counsel for W.R. Grace at trial. In addition, the jury could well have found State Farm's negligence occurred much later than at the time of sale of the fireproofing.

III. Motion for New Trial

(A). Standard for New Trial

W.R. Grace next moves for a new trial. The discretion and authority to grant a new trial is delegated to this Court and involves this Court determining whether the "verdict is against the weight of the evidence, . . . the damages are excessive, or . . . for other reasons, the trial was

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between the verdict form and/or any of the special question answers?
Mr. Plunkett: I do not see a direct conflict. Tr. 6941.

not fair to the party moving." *Selle v. Gibb*, 567 F.Supp. 1173, 1183 (N.D.Ill. 1983) (*quoting Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251, 61 S.Ct 189, 194, 85 L.Ed. 147 (1940)). "Rule 59 gives the trial judge ample power to prevent what he considers to be a miscarriage of justice. It is his right, and indeed his duty, to order a new trial if he deems it in the interest of justice to do so." *Juneau Square Corp. v. First Wisconsin National Bank*, 624 F.2d 798, 806-7 (7th Cir. 1980).

(B). Analysis

1. Testimony of Dr. Corn and Dr. Craighead

[12] Throughout this trial, the Court sought to ensure both parties were allowed full discovery into their opponent's expert witnesses. On February 5, 1993, the Court precluded State Farm's expert witness Dr. Anderson from testifying about his mesothelioma study. The data for this study was based on confidential (and undiscoverable) health records from the State of Wisconsin. The Court concluded that though Dr. Anderson could testify about his opinions in other matters, we would restrict his testimony concerning the mesothelioma study.

W.R. Grace now objects to the application of this rule to its own experts Dr. Corn and Dr. Craighead. During the depositions of Dr. Corn and Dr. Craighead, each was specifically asked if they had formed any opinions as to State Farm's asbestos cross-contamination problem, State Farm's asbestos operation and maintenance program, the reports and opinions of State Farm's experts, and the reasonableness of State Farm's abatement costs. Each expert had no opinions on any of these areas. Later, before trial, counsel for W.R.

Grace gave information to these experts that allowed them to formulate opinions on these areas. This strategy by W.R. Grace effectively prevented State Farm from fully discovering the opinions of W.R. Grace's experts before trial. Therefore, to preserve fairness of the discovery process, the Court determined that Dr. Corn and Dr. Craighead would not be allowed to testify into areas which they expressed no opinion during their depositions.

2. *Testimony of Kevin Boles and Gerald Karches*

[13] On May 27,1993, W.R. Grace disclosed its intention to call Kevin Boles and Gerald Karches as fact witnesses during the damages phase of this trial. These witnesses had personal knowledge of State Farm's asbestos removal costs, specifically, the alleged inflated fees of State Farm's asbestos consultant Hall-Kimbrell. Plaintiff moved to exclude the adding of these witnesses to the witness list. On July 30,1993, the Court, by written order, refused to add these witnesses to the witness list.

The Court reconfirms its July 30, 1993 ruling.

To begin with, these witnesses were added four months after the final pre-trial conference (held on January 19, 1993) in this case. At that conference both sides were required to list their witnesses or be precluded from calling them at trial. Eight days after the conference, State Farm moved to add an additional witness who had just testified against W.R. Grace in another case. The Court refused to allow the addition of this witness citing: "The Court has no desire to open the flood gates and allow this trial to be prolonged *ad nauseam.* No additional witnesses will be allowed after the final pretrial conference." Order, February 17, 1993, at p. 1. Throughout the trial, the Court enforced

this even-handed approach to both parties-- no witness testified who was not identified at the time of the final pretrial conference.

Finally, W.R. Grace had at least constructive knowledge of the J & S and Southwest Hazard problems (the areas that these witnesses would have testified to at trial) long before the final pre-trial conference in this case. Indeed, W.R. Grace included some of the correspondence between State Farm and J & S on their original exhibit list. Therefore, W.R. Grace's claim of prejudice or surprise about the J & S and Southwest Hazard issue, or the claim that these witnesses could not be identified at an earlier date, lacks merit.

3. *American Insurance Association*

[14] On April 28,1993, three months, after the pre-trial cutoff, W.R. Grace sought to add witnesses and documents pertaining to the American Insurance Association (AIA). Many of these documents were available to W.R. Grace before the final pre-trial conference in this case. Nevertheless, W.R. Grace sought to add witnesses and evidence purporting to show that State Farm had knowledge about AIA published information regarding asbestos-containing products when State Farm constructed its buildings.

At that time, the Court deferred ruling on whether to allow evidence of State Farm's connection with the AIA. The Court granted W.R. Grace leave to obtain additional foundational evidence on this issue. However, the Court warned W.R. Grace that it would strike all reference to the AIA if W.R. Grace failed to link State Farm to the AIA.

Finally, on May 4, 1993, the Court instructed the jury to disregard any information concerning the AIA. A jury instruction was submitted to the jury during the liability portion of the trial with the same guidance.

The Court adheres to its previous position because W.R. Grace failed to establish any foundation or connection between State Farm and the AIA. Indeed, State Farm produced an affidavit from the Executive Vice President of the AIA showing that State Farm was not-- nor had ever been--a member of the AIA. Moreover, W.R. Grace had knowledge of the AIA before final pre-trial conference. This issue should have been investigated long before trial began-instead of during the middle of the trial.

In addition, the jury instruction submitted on the AIA was not prejudicial to W.R. Grace. The Court rejected a more strongly worded instruction proposed by State Farm. The instruction given to the jury merely required the jury to disregard information concerning the AIA.

4. John Walsh

[15] During the damages phase of trial, W.R. Grace introduced (over objection of State Farm) the testimony of its expert witness John Walsh. Mr. Walsh's testimony was limited to projects which he had "personally bid." W.R. Grace moves for a new trial on this limitation.

W.R. Grace's position is frivolous. On June 4, 1993, the Court denied State Farm's motion in limine to exclude the testimony of John P. Walsh during the damages phase of this trial. It was a close call. State Farm had twice deposed Mr. Walsh (October 28, 1992 and January 15, 1993). Before both depositions, Mr. Walsh had been presented with State Farm's

"damage summary" indicating what State Farm would include or exclude from its claim. Nevertheless, at both depositions, Mr. Walsh was unable to form an opinion on State Farm's documents comprising its "damages summary." *See e.g.* Walsh Depo. 10/28/92 at p. 90.

At trial, State Farm moved to exclude the testimony of Mr. Walsh because now, after having been unprepared at two depositions to offer opinions, he now had opinions as to State Farm's damages. The Court reluctantly denied State Farm's motion with the caveat that State Farm would be allowed full discovery during trial of Mr. Walsh's newly formed opinions.

State Farm then sought to depose Mr. Walsh's former employer Mr. Kynoch. At the behest of W.R. Grace's motion for a protective order, the Court limited State Farm's discovery of Mr. Kynoch to jobs that Mr. Walsh "bid personally." Indeed, W.R. Grace's counsel at the deposition of Mr. Kynoch took the position that Mr. Walsh's opinions were based on jobs that Mr. Walsh "bid personally." Based on this position, W.R. Grace's counsel refused to produce any documents on projects other than those which Mr. Walsh had "bid personally." Accordingly, the Court limited Mr. Walsh's expert opinion at trial to jobs in which he "bid personally."

Now, contrary to its position at the deposition of Mr. Kynoch, W.R. Grace claims it was prejudiced when the Court precluded Mr. Walsh from testifying about his experience from other jobs. The Court finds that no prejudice existed. Though Mr. Walsh was supposed to be limited to jobs in which he "bid personally," his testimony was much more expansive and included his experience while working on other

jobs.[8] More importantly, W.R. Grace cannot now claim prejudice when the limitation on the scope of Mr. Walsh's testimony was created by: (l) its own motion for protective order; (2) the position of W.R. Grace's counsel during the deposition of Mr. Kynoch; (3) Mr. Walsh's lack of preparation at his first two depositions.

5. *Mr. Walsh's Damage Notebooks*

[16] During the damages phase of trial, State Farm outlined its damages in a series of 15 three-ring notebooks. These exhibits were compilations of invoices incurred by State Farm as a result of abatement activities.

To rebut State Farm's claim that abatement of asbestos was necessary, W.R. Grace called Mr. Walsh as a damages expert witness. As part of Mr. Walsh's trial preparation, he went through the 15 notebooks and marked which invoices he thought were not related to the State Farm's abatement project. Mr. Walsh's notebooks were identical to State Farm's with the exception that: (1) the invoices were printed on pink paper (as opposed to white); (2) the invoices were flagged with a red post-it sticker. Mr. Walsh's series of notebooks were marked as defense exhibits 1949.1-1949.15. The Court ruled that these exhibits could be used as demonstrative evidence only and would not be allowed to go to the jury.

The Court properly treated these exhibits at trial. To begin with, these exhibits were never timely listed by W.R. Grace on any exhibit list as part of the pretrial order. Indeed, Mr. Walsh admitted during cross-examination that his

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[8] Tr. 8284, 8286, 8557, 8558, 8567, 8695, 8707, 8764.

notebooks were not prepared until trial. Accordingly, these notebooks violated the Court's pre-trial order and were properly excluded. Second, during the liability portion of the trial, the Court prevented State Farm from introducing evidence that was highlighted and evidence with tabs from reaching the jury. The Court insisted that all highlighting be removed from the evidence (if the highlighting did not accompany the original production of the evidence to the opposing party). The Court excluded the highlighted exhibits of Mr. Walsh under the same principle.

(C) *Jury Instructions*

1. *Duty to Warn*

[17] The Court charged the jury with the following instruction:

> If W.R. Grace knew or should have known at the time it sold the MK3 to State Farm that its product was hazardous, then W.R. Grace was under a continuing duty to communicate such knowledge to State Farm. (Emphasis ours).

W.R. Grace objects to this instruction citing *Carrizales v. Rheem Manufacturing Co.*, 226 Ill.App.3d 20, 168 Ill.Dec. 169, 179, 589 N.E.2d 569, 579 (1991), *app. denied*, 146 Ill.2d 623, 176 Ill.Dec. 794, 602 N.E.2d 448 (1992). However, *Carrizales* actually supports the Court's position:

> Illinois law has been reluctant to impose a duty to warn beyond the time when the product leaves the manufacturer's control *unless the manufacturer knew or should have known at that time that the product was defective.*

Id. 168 Ill.Dec. at 179, 589 N.E.2d at 579 (Emphasis ours).

Here, the Court did not impose a duty to warn on the manufacturer where a manufacturer learns of a hazard *subsequent* to the time the product left its control. Rather, consistent with Illinois law, the instruction imposed a duty on the manufacturer to warn if the manufacturer had knowledge of the defective product at the time of the sale.

2. Assumption of Risk

[18] Next, W.R. Grace frivolously argues that the Court's assumption of risk special interrogatory was in error. This instruction properly instructed the jury to consider the assumption of risk defense if it found against W.R. Grace on the basis of strict liability or negligence. The special interrogatory also told the jury only to consider the assumption of risk defense with regard to strict liability in tort.

Ironically, it was W.R. Grace who suggested the necessity of this instruction. Originally, the Court submitted its own assumption of risk instruction because *neither* party submitted this requisite instruction as part of their proposed jury instructions.[9] Then, at the behest of both parties, the Court amended the assumption of risk instruction to the form that was submitted to the jury:

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[9] Indeed, W.R. Grace, then, and now, cites no authority for their proposition. Now, in their brief for new trial, they neither cite the specific jury instruction which they claim was in error (the Court is left to guess which assumption of risk instruction W.R. Grace refers to), nor is there a direct citation to the transcript.

If you find that State Farm assumed the risks relating to the hazards of the fireproofing in its building, enter the percent of fault, if any, on Special Question No. 6.

Special Question No. 6 states:

As to Count I (Strict Liability), if you find Plaintiff, State Farm assumed the risk, what percentage. if any, was State Farm at fault?

[19] Counsel for W.R. Grace assisted in the crafting of the language of these instructions which both parties specifically agreed was proper. W.R. Grace cannot now object to the validity of this instruction.

3. *Choice of Repair*

[20] State Farm's position at trial was that it should be able to choose the appropriate method to repair the asbestos-contamination. State Farm removed much of the asbestos in its buildings. Therefore, State Farm took the position that damages should be largely based on removal costs. W.R. Grace took the position that State Farm should not have removed the asbestos, but instead should have managed the asbestos with an operation and maintenance program until demolition of the building. Hence, according to W.R. Grace, the measure of damages should only be the cost of the operation and maintenance program. However, both choices require the eventual removal of asbestos. Federal regulations (NESHAPS) require the removal of all asbestos at the demolition of the building.

The Court submitted the following instruction to the jury:

> In this case, the proper measure of damages is the cost of repair, which is the cost of removing the asbestos fireproofing and its damage from State Farm's buildings and the costs associated therewith. Although you have heard evidence that all of the asbestos has not yet been removed, that does not change the measure of damages. The future cost of removal of the remaining asbestos should be calculated as well. It is for you to decide when the fireproofing should have been or should be removed.
>
> The owner of damaged property has discretion to decide how to fix the damage to the property. He may choose the repair method which he deems to be best suited to the restoration of its property to its pre-damaged state . . . .

This instruction was crafted from two parts. The second paragraph of the instruction was proposed by State Farm. The first paragraph was drafted by the Court over the strenuous objection of State Farm at trial. W.R. Grace never proposed any instruction on this issue. Nevertheless, W.R. Grace now objects to the second paragraph of this instruction.

The Court's instruction was proper. First, the instruction is firmly grounded in Illinois law.[10] *Northwest Commerce Bank v. Continental Data Forms, Inc.*, 233 Ill.App.3d 124, 174 Ill.Dec. 249, 251, 598 N.E.2d 446, 448 (1992); *United States v. Peavey Barge Line*, 590 F.Supp. 319, 323 (C.D.Ill. 1984) *aff'd* 748 F.2d 395 (7th Cir.1984).

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[10] W.R. Grace offers no authority for their position that the victim of a tort does not have a choice of repair.

Second, W.R. Grace suffered no prejudice. The Court gave W.R. Grace wide latitude to argue that a building owner such as State Farm should have managed the asbestos in place instead of promptly removing the fireproofing. Even though W.R. Grace never offered a jury instruction, the Court added the last sentence to the first paragraph of the instruction in light of W.R. Grace's position at trial. In any event, there is nothing inconsistent with the two paragraphs. Paragraph two addresses the method of repair (removal vs. operation and maintenance). Paragraph one deals with the timing of the repair (e.g. must the asbestos be removed now or at demolition?). W.R. Grace took every opportunity to argue to the jury that State Farm should have managed its asbestos in place until some later date in the future when the building is inevitably demolished. The jury simply disagreed.

4. *Nominal Damages*

[21] The Court also refused to submit a nominal damage instruction to the jury. This refusal was appropriate.

First, the jury did not consider any evidence in the damages phase of the trial that nominal damages are appropriate. Unlike the one case W.R. Grace cites in support of its proposition,[11] the position of W.R. Grace throughout the trial had been that the measure of damages should be the operation and maintenance costs of containing the asbestos. At a minimum, the expert witnesses for W.R. Grace testified that this cost would run into the millions of dollars. Given W.R. Grace's position, and the fact that W.R. Grace never submitted any evidence to the jury that damages would be

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[11] W.R. Grace cites no authority for its position in its motion for new trial.

nominal, the Court properly refused the nominal damages instruction.

[22] Second, during the liability portion of the trial, the jury found that: (1) State Farm's properties were damaged; and (2) that the negligence of W.R. Grace was a proximate cause of the damage to State Farm's properties. Where property "damage" is proved, compensatory--not nominal--damages are inferred. See *Rosario v. Livaditis*, 963 F.2d 1013, 1021(7th Cir. 1992) ("A finding of liability for violations of RICO is conspicuously inconsistent with an assessment of zero damages for those violations since the jury was required to find that the class suffered an injury to business or property before finding the debtor liable."); *Gavcus v. Potts*, 808 F.2d 596, 97-99 (7th Cir. 1986) ("Nominal damages can be awarded when no actual or substantial injury has been alleged or proved, since the law infers some damage from the unlawful entry of land . . . . To allow only nominal damages under the circumstances presented because of lack of physical harm would permit the trespasser to enjoy the benefits of his tort without fully compensating Plaintiff for his loss."); *Stirs, Inc. v. Chicago*, 24 Ill.App.3d 118, 320 N.E.2d 216 (1974).

Third, the Court took judicial notice of the NESHAPS regulations in our January 14, 1993 Order. In that Order, the Court stated that the NESHAPS regulations would serve to establish the guidelines for assessing damages. Because the jury found W.R. Grace negligent in supplying asbestos, it necessarily follows from NESHAPS that State Farm must eventually remove the asbestos prior to demolition. This removal cost will warrant more than a nominal damages award.

Ergo, for the above reasons, W.R. Grace's motion for judgment after trial, and alternatively, motion for new trial is DENIED. The Clerk is directed to tax costs in this case with the entry of this order.

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS--SPRINGFIELD DIVISION

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,	)	
Plaintiff,	)	
v.	)	NO. 89-3022
W.R. GRACE & COMPANY,	)	
Defendant.	)	

ORDER

RICHARD MILLS, District Judge:

This cause is before the Court on Grace's motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a)(1).

I. Standard of Review

Federal Rule of Civil Procedure 50 states that judgment as a matter of law shall be granted when "a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue." Fed. R. Civ. P. 50(a)(1) (1992); Brooktree Corp. v. Advanced Micro Devices, Inc., 977 F.2d 1555, 1569 (Fed. Cir. 1992). This standard posits that a reasonable jury would have assessed the

credibility of witnesses, considered and weighed the evidence presented by both sides, and applied the law in accordance with the court's instructions. Id. at 1569.

II. Analysis

A. Statute of Repose (Il. Rev. Stat. ch. 110, ¶13-214).

The Court finds this issue extremely close. On one hand, the Court notes that recent decisions have excluded asbestos manufacturers from protection under ¶13-214 because the asbestos manufacturer's role in supplying asbestos did not fall within any of the statute's (¶13-214) specifically enumerated activities. Heider v. Grace, 1993 WL 75039 (N.D. Ill. March 3, 1993); Landry v. Keene Corp., 811 F. Supp. 367, 371 (N.D. Ill. 1993). In addition, dicta from Witham v. Whiting Corp., 975 F.2d 1342, 1347 (7th Cir. 1992), interpreted the legislative history of ¶13-214 to protect only architects, construction companies, engineers, and the like.

On the other hand, Grace's "activities" and involvement in the construction of the State Farm building appears to be more substantial than the activities of a supplier--perhaps distinguishing this situation from the cases cited above. In addition, in St. Louis v. Rockwell Graphic Systems, Inc., 605 N.E.2d 555, 557 (1992), the Illinois Supreme Court arguably did not recognize the distinction between "mere manufacturers" and architects, engineers, etc., which was recognized in the dicta of Witham.

However, because neither the Illinois Supreme Court nor the Seventh Circuit has set a clear threshold as to how much involvement on the part of a manufacturer will constitute "design, planning, supervision, or observation" (per

¶13-214), the Court will take this motion under advisement at this time--at least until the close of the liability portion of this trial.

B. Fraudulent Concealment (Ill. Rev. Stat. ch. 110, ¶13-215)

Grace next argues that State Farm failed to establish fraudulent concealment to toll the product liability statute of repose. Ill. Rev. Stat. ch. 110, ¶13-215.

> Paragraph 13-215 provides:
> If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such cause of action, and not afterwards.

To state a case for fraudulent concealment to toll the statute of repose, State Farm must prove that Grace made affirmative acts or representations which were calculated to prevent and did in fact prevent the discovery of the cause of action. Landry, 811 F. Supp. at 372. Even if this standard is met, paragraph 13-215 does not apply if State Farm would have discovered the action with ordinary diligence. Id.

The question of whether Grace affirmatively concealed State Farm's cause of action is extremely close. Grace presents an impressive list of evidence showing that State Farm had knowledge that asbestos was being used in State Farm's buildings. First, the Sweet's Catalogue (Def. Ex. 357) stated that MK-3 did contain minimal amounts of asbestos "locked-in" during the mixing process. The Catalogue also

advises that there are potential problems in the "changing conditions involving fireproofing and its relation to fireproofing and health, we recommend that you contact your Zonolite sales office for the latest data on these subjects." This Catalogue was approved by State Farm's architect and became part of the permanent shop construction drawings in State Farm's record department. Tr. 3227:22-25.

Second, State Farm received notice of potential asbestos problems from a 12/1/71 letter from State Farm's architect, Mr. Wesley, to Mr. Frankenberger, a State Farm construction executive. Tr. 3168:4-3170:9. This letter incorporated an earlier inter-office memorandum (of the architect) which stated that the architect was "obtaining supplementary information on asbestos problems." Pl's Ex. 1125. The memorandum also stated that the architects were looking critically at the asbestos containing component of MK-3 and that MK-3 was not approved for use in "New York and Philadelphia and W.R. Grace [had] begun a limited production (in 2 or 3 plants) of Monokote IV to meet the criteria of [those] two cities and the Chicago area." Id.

Third, Grace represents that two State Farm executives, Mr. Solomon and Mr. Aldridge, were former asbestos industry executives at UNARCO. Tr. 3216:22-3217:17. Grace represents, though does not support this representation with a citation to the transcript, that these former asbestos industry executives were aware of the pollution problem and health issues raised by the Sweet's Catalogue and the "asbestos problem" referred to by architect Wesley in his letter to State Farm.

Fourth, Grace argues that State Farm received information about the dangers of asbestos from a variety of other sources: (1) medical professionals (e.g. Dr. Frisch)

working at State Farm were aware of and had access to all medical knowledge related to asbestos health questions in the 1960's and 1970's; (2) governmental regulations passed by the EPA, 36 Fed. Reg. 5931 (1971), and the City of Chicago (Pl's. Ex. G100.06), declared asbestos a hazardous air pollutant and banned the spray application of asbestos-containing materials; (3) State Farm's own underwriting policies had already assessed the risk of asbestos exposure and asbestos-containing building materials. Tr. 4359; (4) Information about asbestos risks from the American Insurance Association from which State Farm was a subscriber. Def's Exhs. 922-24. The upshot of all these arguments is that State Farm either knew about the risks of asbestos, or should have known based on the information it actually received and reviewed.

However, at this time, the Court finds that none of Grace's evidence prevents a jury from finding that Grace's affirmative misrepresentations prevented State Farm from discovering its cause of action. The Sweet's Catalogue states that MK-3 contains "minimal" amounts of asbestos which are "locked in."[1] In fact, MK-3 may contain as much as 15% asbestos. Further, the Court is troubled by the ambiguous representation that the asbestos fibers are "locked-in." State Farm presented two different types of evidence which could be interpreted as disputing this fact. Settled Dust Sample

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[1] Grace made this representation on numerous other occasions as well: "[o]ur research data on air erosion, cohesive and adhesive bond, plus the many years of experience on fireproofing of buildings with curtain walls add up to a problem free future with respect to dusting." Tr. 198; see also Tr. 3049-51; 3033-38. Grace also told Ellerbe architects that the asbestos fibers were within OSHA limits and "were locked into place and not a concern." Tr. 590-91; P. Ex. 1120.

reports show that numerous asbestos fibers have been released from State Farm's buildings.[2] Tr. 421. In addition, State Farm's evidence of the Boyle test (conducted before the Sweet's Catalogue was compiled) also ostensibly found that dusting and erosion did occur with Monokote under an air erosion test. Tr. 185. Other tests and applications also indicated that Monokote had problems with dusting. Tr. 1007-09, 203-212.

State Farm also produced evidence that Grace misled it about the composition of MK-3 and the availability of non-asbestos fireproofing. Grace did not refute State Farm's evidence that Grace plant superintendents and sales personnel were advised not to tell customers of the change in the Monokote formula to non-asbestos containing materials.[3] Tr. 164, 175, 178, 196, 472, 526, 606. Further, given the context that MK-3 was more expensive than MK-4, (Tr. 162 and 164), and that an EPA ban would leave Grace with unsold MK-4, (Tr. 179), the Court (based on only this evidence) rules that a reasonable jury could find that Grace concealed the true nature of MK-3 (and hence, prevented State Farm from discovering its cause of action).

Second, the 12/1/71 letter from Mr. Wesley to Mr. Frankenberger is ambiguous. True, the letter raises the issue of the potential dangers of MK-3 (the fact that it was

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[2] Of course, this finding is disputed by Grace's asbestos air monitoring tests.

[3] The McDougall testimony contradicts this interpretation of Grace's misrepresentations. However, the Court found his testimony on the subject was unclear. Further, Grace has not refuted State Farm's interpretation of this misrepresentation in its memorandum.

banned on the east coast). Nevertheless, the letter refers to the dangers of sprayed asbestos fireproofing (as opposed to cementitious fireproofing MK-3). One of the attached memorandum to the 12/1/71 letter (a 3/23/71 letter from Grace's Mr. Egan to Mr. Bechtolt at the Fire Insurance Research and Actuarial Association) also distinguished MK-3 from "the sprayed mineral fiber types which have caused so much controversy not only in the area of improper application but in pollution." Pl. Ex. 1120. A reasonable jury could therefore find that this letter gave State Farm the impression that there was either no asbestos in MK-3 or there was no danger from any of the ingredients because of MK's "cementitious" nature (e.g. the asbestos fibers were "locked in"). Tr. 3039-41.

However, the more difficult question posed by Grace's evidence is whether State Farm would have discovered the action with ordinary diligence. Again, as the Court elucidated in its 1/5/92 Order on Grace's Summary Judgment Motion, the asbestos cause of action arises when State Farm had knowledge of asbestos contamination. Therefore, the relevant inquiry for the Court is to determine if State Farm presented evidence that it was diligent in its discovery of an asbestos contamination problem--not that it had mere "knowledge of asbestos."

At this time, the Court finds that State Farm has submitted sufficient evidence to avoid judgment as a matter of law on this issue. As mentioned above in the 12/1/71 letter from Mr. Wesley, State Farm made an active inquiry into the potential MK-3 asbestos problem. Pl. Ex. 1125. They were told by Mr. Wesley (who apparently, as State Farm represents, based his information on a letter received from Grace) that Monokote is less apt to cause asbestos related problems than sprayed fiber asbestos. The evidence

also showed that State Farm's Mr. Solomon asked W.R. Grace if State Farm's buildings contained asbestos. Pl. Ex. 1282; Tr. 3044-47. In response, Grace representatives informed State Farm that their fireproofing product is formulated without asbestos (referring not to MK-3, but later Monokote formulations). Thus, it is possible that State Farm could be misled (albeit innocently) into believing there was no asbestos contamination at that time. There is also evidence that State Farm and Ellerbe relied upon Grace to properly test and warn about the dangers of MK-3. Wesley Dep. at 50.

Finally, Grace maintains that the State Farm buildings are not contaminated with asbestos--even to this day. Def. Dir. Verdict Motion at 11-12. Thus, it is difficult for Grace to argue that this action should be dismissed because State Farm should have brought this lawsuit earlier, or should have been more diligent in discovering the asbestos contamination problem, when the fact of whether or not State Farm's buildings are contaminated is disputed in both the legal and scientific communities.

C. Strict Liability Statute of Repose

The Illinois Strict Liability Statute of Repose bars any product liability action based on the doctrine of strict liability in tort which is not brought within 12 years from the date of first sale of the product. Ill. Rev. Stat. ch. 110, ¶13-213(b). Grace's product was sold to State Farm in 1973 at the latest. Jan. 5 Order at 7. Therefore, Grace argues, because there is no evidence of fraudulent concealment sufficient to toll this period, State Farm's strict liability claim was time barred as a matter of law no later than 1985. See Landry v. Keene, 811 F. Supp. 367, 372 (N.D. Ill. 1993).

However, unlike Landry, State Farm has alleged and presented evidence by which a reasonable jury could find fraudulent concealment. See supra discussion at B. Therefore, the Court denies Grace's directed verdict motion on this point.

D. Property Damage Statute of Limitation

The Illinois statute of limitations applicable to actions for the recovery of damages for injury done to property requires that such actions be commenced within five years of the accrual of the cause of action. Ill. Rev. Stat. ch. 110, ¶13-205. This Court has held that State Farm's cause of action accrued when State Farm had sufficient knowledge of contamination from the asbestos that it knew was in the building. January 5 Order at 3-4. As discussed above, Grace argues that State Farm had knowledge of the presence of asbestos in their buildings in 1971 and that the spraying of MK-3 had been banned in New York, Philadelphia, and Chicago. Pl's Ex. 1125. Thus, Grace now charges that State Farm had knowledge of asbestos contamination in the 1970's (and hence State Farm's claim should be barred by ¶13-205).

The Court again finds Grace's evidence inconclusive. Plaintiff's Ex. 1125, as mentioned above, could be interpreted as representing that MK-3 does not present a contamination problem. (Again, Grace would not refute this statement). Similarly, although Grace cites the testimony of Mr. Strong (Tr. 1634-35) for the proposition that State Farm was actively investigating asbestos in the early 1980's, the answer State Farm received from these inquiries was that asbestos fireproofing was not used. Tr. 1635. Therefore, the Court denies this portion of Grace's directed verdict motion.

E. Fraud

The issues presented here were essentially the same as outlined in the Court's discussion of the fraudulent concealment statute of repose. The Court finds that State Farm's evidence that asbestos fibers were not "locked in" to Monokote and that Monokote had problems with respect to dusting when it was sold is sufficient to form a jury question. Again, the Court will likely re-examine this issue closely at the close of Defendant's case.

F. Wilful and Wanton Conduct

State Farm's wilful and wanton misconduct claim must be evaluated at the time that Grace manufactured and sold the fireproofing incorporated in State Farm's buildings. To prevail under a willful and wanton misconduct theory, State Farm must prove that Grace had actual or constructive knowledge that its conduct, i.e., the sale of asbestos containing Monokote fireproofing to State Farm, presented a high probability of serious physical harm to others. Bark v. 12 Rothchilds Liquor Mart, Inc., 593 N.E.2d 522, 530-31 (1992). Moreover, a recovery under willful and wanton misconduct theory is appropriate only in those instances where a party's actions are so outrageous as to merit:

> [T]he degree of moral blame attached to intentional harm the defendant deliberately inflicts a highly unreasonable risk of harm upon the other in conscious disregard of it.

Id. at 530 (citation omitted). Here, Grace argues that State Farm failed to prove that the MK-3 installed in State Farm's buildings presented a high probability of serious physical harm to the occupants of the building. Indeed, Grace offers

evidence which confirms that MK-3 did not contaminate the air in State Farm's buildings. Def's Exs. 470, 541, 498, 499.

State Farm did not directly refute Grace's argument. In its response to Grace's motion for judgment as a matter of law, State Farm focused on Grace's profit motive, government lobbying efforts, and policy of not informing its customers that it was supplying asbestos. Pl's Response to Dir. Verd. Motion at 35-40. State Farm did present some evidence of the general harms of asbestos under the heading of Grace's negligent conduct, see id. at 15-18 (Tr. 430-32, 475, 477, 479, 483, 487). But it is not clear if any of this evidence proves that the asbestos in State Farm's buildings is an unreasonably dangerous condition necessary to support a wilful and wanton conduct claim.

Therefore, State Farm will be granted leave to respond to Grace's specific objections until May 7, 1993. Failure to respond to Grace's objection may result in the Court deeming this part of Grace's motion confessed.

G. Strict Liability

State Farm must prove three elements to recover for strict liability: (1) that the alleged injury resulted from a condition of the product; (2) that the condition was an unreasonably dangerous one; and (3) that the condition existed when the product left the manufacturer's control. Broussard v. Houdaille Indus., Inc., 539 N.E.2d 360, 362 (1989). Again, State Farm did not directly respond to this portion of Grace's motion for a Directed Verdict. Accordingly, State Farm will be granted leave to file a response to Grace's specific objections until May 7, 1993. Failure to respond to Grace's objection may result in the Court deeming the motion confessed.

H. Negligence

Grace argues that State Farm has not presented sufficient evidence that Grace was negligent because it sold asbestos-containing products while knowing that asbestos was hazardous to persons who used the buildings in which the products were included. Specifically, Grace contends that no evidence supports any breach of alleged duties on the part of Grace. In addition, Grace argues that State Farm had knowledge of asbestos and asbestos-containing products, as well as the impact of that knowledge on its negligence claim.

In deciding whether a duty of reasonable care exists, the Court must consider: (1) the foreseeability of the injury, (2) the magnitude of the burden of guarding against the injury, and (3) the consequences of placing that burden on the defendant. Champs v. Chicago Housing Authority, 491 N.E.2d 20, 141 Ill. App. 3d 881 (1986).

State Farm provided evidence on all three elements. First, evidence was produced that a non-asbestos substitute was available (MK-4) at the time of the State Farm's building construction. Tr. 622-23. Second, evidence was produced that the cost of switching to MK-4 would be minimal. Tr. 1423-25, 622-23. Third, evidence was produced that the harms of using asbestos fireproofing were foreseeable. Tr. 430-32, 479.

Next, State Farm produced sufficient evidence that this duty was breached. To begin with, State Farm produced evidence that Grace failed to warn State Farm about the dangers of asbestos. Tr. 144, 148, 149, 150. Evidence was also submitted that Grace failed to adequately test Monokote, (Tr. 540-41, 573, 578-79, 888-90), failed to instruct State Farm in the safe use of Monokote, (Tr. 198, 3049-51), and

failed to meet its continuing duty to warn State Farm of the hazards of Monokote. Tr. 1731-32, 441, 2336-37.

Finally, State Farm produced sufficient evidence that Grace's Monokote is the proximate cause of damages suffered by State Farm. Tr. 227-28, 1147-49, 1161-63, 477, 1258-59, 1178.

As a result, the Court finds that State Farm submitted sufficient evidence to state a jury question on the issue of negligence.

Ergo, Defendant's oral motion for judgment as a matter of law is DENIED. With respect to the construction statute of repose, the court will take the matter under advisement. The Court denies Defendant's motion with respect to the fraudulent concealment tolling statute, negligence claim, fraud claim, strict liability statute of repose, and property damage statute of limitation. The Court directs Plaintiff to file a response with additional information by May 7, 1993, concerning the strict liability and wilful and wanton conduct claims. Failure of Plaintiff to respond to the two specific issues raised by the Defendant may result in the Court deeming the two issues confessed.

ENTER: 22 April, 1993.

FOR THE COURT:

/s/
Richard Mills
United States District Judge

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., Plaintiff
v. W.R. GRACE & COMPANY, Defendant.

No. 89-3022.

United States District Court, C.D. Illinois, Springfield Division
Dec. 30, 1992

ORDER

RICHARD MILLS, District Judge:

This cause is before the Court on Grace's motion for summary judgment pursuant to Fed.R.Civ.P.56(c). Because the overwhelming majority of court decisions favor the position of the State Farm, the Court denies this motion except as to Count III of State Farm's complaint (breach of express warranties).

State Farm filed its original complaint on January 30, 1989. Pursuant to Grace's motion to dismiss and State Farm's withdrawal of certain claims, State Farm filed an amended complaint on December 12, 1991. In the amended complaint, State Farm relies on five different theories of recovery, including strict liability, negligence, breach of express warranties, fraud and misrepresentation, and willful and wanton misconduct. All claims seek compensation for property damage allegedly caused by the incorporation of asbestos-containing fireproofing in State Farm's corporate headquarters in Bloomington, Illinois, and its regional office buildings in Austin, Texas, and Tempe, Arizona [hereinafter "Buildings"].

I. *Standard for Summary Judgment*

[1-3] Under Fed.R.Civ.P.56(c), summary judgment shall be granted if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Black v. Henry Pratt Co.*, 778 F.2d 1278, 1281 (7th Cir. 1985). The moving party has the burden of providing proper documentary evidence to show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A genuine issue of material fact exists when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Unquestionably, in determining whether a genuine issue of material fact exists, the evidence is to be taken in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598 (1970). Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials of the pleadings, which demonstrates that there is a genuine issue for trial. *Howland v. Kilquist*, 833 F.2d 639 (7th Cir. 1987).

II. Analysis

Grace argues that State Farm's claim is time barred because of various Illinois statutes of limitation.

(a) *Personal Injury Statute of Limitation*

[4] Grace has asserted correctly that Illinois statute of limitations apply to State Farm's claims. A federal court sitting in diversity follows the choice of law rules of the forum state. *Klaxon v. Stentor*, 313 U.S. 487, 61 S.Ct. 1020,

85 L.Ed. 1477 (1941). Grace first argues that Ill. Rev. Stat., ch. 110, ¶ 13-205 (1989), establishes a five year limit on actions "to recover damages for an injury done to property, real or personal . . . ." This period began to run as soon as the alleged asbestos product was installed in the buildings in 1970-73. Because State Farm did not file this action until 1989, Grace argues that the five year statute of limitation precludes this action.

Defendant also argues that this limitation period should not be tolled because of any "fraudulent concealment." A statute of limitation may be tolled pursuant to Ill. Rev. Stat., ch. 110, ¶ 13-215 (1989), if a person liable for the action fraudulently conceals the cause of the action. However, in this case, the architect of the buildings knew the composition of the fireproofing material that was installed in the buildings as early as 1971. Because the architect was an agent of State Farm, and because an agent's knowledge is imputed to its principal, Defendant argues that there is no fraudulent concealment because State Farm had knowledge through its architect of the alleged asbestos materials.

[5, 6] Grace's argument has not withstood judicial scrutiny. First, as State Farm points out, the mere presence or knowledge of asbestos is insufficient to trigger the personal injury statute of limitation. Rather, the statute of limitation did not begin to run until State Farm had sufficient knowledge of asbestos *contamination*. *AFM Insurance Co. v. Board of Education*, No. 90 C 6040, Slip op. at 37, 39, 1992 WL 409442 (N.D. Ill., October 5, 1992); *Heider v. W.R. Grace & Co.*, No. 89 C 9067, 1992 WL 189254 (N.D. Ill., July 15, 1992); *In re: School Asbestos Litigation*, No. 83-0268, Pre-Trial Order No. 268 (E.D. Pa. April 12, 1990); *Plaza 600 Corporation v. W.R. Grace & Co.*, No. C89-1562D (W.D.Wa., June 19, 1991); *County of San Diego v. W.R.*

Grace & Co., No. 208188 (Cal.Super.Ct., Riverside City, Jan. 31, 1992); *Board of Education v. AC & S, Inc.* 131 Ill.2d 428, 137 Ill.Dec. 635, 546 N.E.2d 580 (1989). Therefore, the relevant factual inquiry for this Court is not whether State Farm had knowledge that asbestos was being used, but whether State Farm had knowledge that asbestos was being released from the fireproofing material and that it presented a hazard.

[7] Drawing all reasonable inferences from the evidence presented by State Farm, as this Court must in this summary judgment proceeding, the Court finds that State Farm has met the requisite showing of a material fact to preclude summary judgment. The statute of limitation statute begins to run "when a party knows or reasonably should know that an injury has occurred and that it was wrongfully caused." *Nolan v. Johns-Manville Asbestos*, 85 Ill.2d 161, 52 Ill.Dec. 1, 5, 421 N.E.2d 864, 868 (1981). State Farm's evidence indicates that it was not until June of 1986 that State Farm was aware of the presence of asbestos in the buildings. (Pl's exhibit 14, Strong Aff., at ¶¶ 5-8) (Pl's exhibit 15, Aldridge Aff., at ¶¶ 2-8). It was not until December of 1988 that dust sample analysis test results were available which indicated that the buildings were contaminated with an asbestos. (Pl's Exhibit 16). Therefore, the Court finds there is sufficient evidence for a jury to find that State Farm acted reasonably in filing its claim within the statute of limitations period.

The Court makes this finding despite Grace's evidence that there was some awareness on the part of State Farm, prior to 1986, of the presence of asbestos in the buildings. Nevertheless, Defendant failed to show that State Farm was aware of an asbestos *contamination* problem. For example, even if Defendant's architect was are of the usage of asbestos

in the building (a fact disputed by State Farm), and if the architect was an agent of State Farm (disputed by State Farm and the holding of *Blue Cross & Blue Shield v. W.R. Grace & Co.*, 781 F. Supp. 420, 423-24 (D.S.C. 1991)), and an agent's knowledge of the asbestos could be imputed to State Farm (again disputed by State Farm and the holding of *Cheshire Medical Center v. W.R. Grace & Co.*, No. 85-516D, 1992 WL 544949 (D.N.H., Feb. 18, 1992)), this knowledge still does not prove that State Farm was aware of any asbestos *contamination* problem before 1986.

[8] Second, the Court finds that State Farm submitted sufficient evidence to toll the five year statute of limitations provision pursuant to Ill.Rev.Stat. ch. 110, ¶ 13-215 (1989). For a plaintiff to avail itself of ¶ 13-215, it must show that "defendant . . . made representations or performed acts which were known by it to be false, with the intent to deceive the plaintiff, and upon which plaintiff detrimentally relied." *Harvey v. Harris Trust & Savings Bank*, 73 Ill.App.3d 280, 287, 29 Ill.Dec. 198, 391 N.E.2d 461 (1979). Though this issue is close, the Court finds that a jury could find for the State Farm on each of these elements of fraudulent concealment.

State Farm's evidence shows that in November of 1972, a Grace official visited State Farm's buildings and assured Plaintiff that it would have "a problem free future with respect to dusting." (Pl's Ex. 11). By this time, however, Grace was aware that the fireproofing material used had a chronic cracking problem (Pl's Ex. 19), knew that the product was being forced off the market in some areas of the country because of health concerns (Pl's Ex. 20), and had developed a non-asbestos substitute product because of the asbestos-containing product's problems (Pl's Ex. 20). Perhaps even more damaging is the evidence that Grace adopted a

policy of intentionally withholding information about whether their fireproofing products contained asbestos in 1972. (Pl's Ex. 8). Grace also sent information to State Farm in 1986 which was found by a Federal Court[1] to be misleading or incomplete at best. The Court finds that this evidence, taken as a whole, presents a question of material fact from which a jury could find fraudulent concealment.

(b). *Fraud and Misrepresentation*

[9] Grace also moves for summary judgment on Count IV of Plaintiff's complaint labeled "Fraud and Misrepresentation." Because the Court has already found that material issues of fact exist concerning whether there was "fraudulent concealment," the Court finds there is also a factual dispute as to whether there was "Fraud and Misrepresentation." Motion denied.

(c). *Statute of Repose*

Count I of State Farm's amended complaint seeks relief under the doctrine of strict liability in tort. Grace moves for summary judgment on this Count pursuant to Ill. Rev. Stat., ch. 110, ¶13-213 (1989). Paragraph 13-213 bars any product liability action based on the doctrine of strict liability in tort which is not brought within twelve years from the date of first sale of the product. State Farm alleges that the buildings were constructed between 1970 and 1973, during which time Grace's product was installed. Therefore, because State Farm did not file its claim until 1989, Grace

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[1] *In re: School Asbestos Litigation*, 115 F.R.D. 22, *vacated*, 842 F.2d 671 (3d Cir. 1988).

argues that its claim is time-barred by ¶13-213 (the statute of repose).

Grace also strenuously argues that ¶13-213 should not be tolled for fraudulent concealment (Ill.Rev.Stat., ch. 110, ¶13-215 (1989)) because ¶13-213 does not expressly provide for the fraudulent concealment tolling exception. For example, Ill.Rev.Stat., ch. 110, ¶13-214(e) (repose statute for construction) states that repose statute for construction does not apply to cases arising out of fraudulent concealment. No similar provision is found in ¶13-213. Thus, Grace argues that the tolling statute for fraudulent concealment should not supersede the repose statute for product liability (¶13-213).

[10, 11] However, the only Illinois Appellate Court to consider the issue stated that the tolling statute for fraudulent concealment does apply to product liability statute of repose (or at least to ¶13-213(d)). *Tate v. Beverly Chrysler Plymouth*, 182 Ill.App.3d 830, 131 Ill.Dec. 288, 291, 538 N.E.2d 663, 666 (1989). Therefore, regardless of the merits of Grace's argument, it is apparently not the current state of Illinois law. As a result, because the Court finds State Farm has submitted a sufficient case of fraudulent concealment, the Court denies Grace's motion for summary judgment on Count I of State Farm's complaint.

(e). *Breach of Express Warranties*

[12] In Count III, State Farm alleges that Grace "expressly warrant[ed] ... that Monokote could be safely used in buildings, would not dust, that said product would require no attention or special precautions, and furthermore, said Defendant expressly warranted said products as being safe and suitable for use in the building in the future." State Farm

then contends that Grace breached those warranties because its representations were not true.

Grace argues that ¶2-725 of the Illinois Uniform Commercial Code provides that an action for breach of any contract for sale must be commenced within four years after the cause of action is accrued. Ill.Rev.Stat., ch. 26, ¶2-725(1). Paragraph 2-725 further provides that a cause of action accrues when the breach occurs, regardless of the agreed parties' lack of knowledge of the breach. Paragraph 2-725 also provides that a breach of warranty occurs when tender of delivery is made. Ill.Rev.Stat., ch. 26, ¶2-725(2). Therefore, Grace argues, that breach of warranty occurs at the time of delivery of goods.

In the case of State Farm, Grace argues that tender of the product took place at the latest in 1973. Accordingly, any purported breach of warranty occurred at that time and State Farm had four years thereafter to file its claim. Because State Farm did not file this action until 1989, its claim for breach of warranty is time-barred. The Court agrees.

State Farm argues that ¶2-725 does not preclude this action because Grace "explicitly" extended the warranty to future performance of the goods. Ill.Rev.Stat., ch. 26, ¶2-725. However, this exception to ¶2-725 has been narrowly construed. *Jones & Laughlin Steel Corp. v. Johns-Manville Sales*, 626 F.2d 280, 290-91 (3d Cir.1980) (interpreting Illinois law); *Beckmire v. Ristokrat Clay Products Company*, 36 Ill.App.3d 411, 412-13, 343 N.E.2d 530, 532 (1976) The Court finds that the alleged express warranties contained in Plaintiff's exhibits 11, 22, and 31 do not rise to the level of an "explicit" extension of a Warranty as required by ¶2-725. *See Johns-Manville Sales*, 626 F.2d at 291. Therefore, the

Court grants Defendant summary judgment on Count III of Plaintiff's complaint.

(f). *Construction Statute of Repose*

[13] Grace next argues that State Farm's entire claim is barred by the construction statute of repose (Ill.Rev.Stat., ch. 110, ¶13-214(b) (1989)). Paragraph 13-214(b) provides that no action may be brought for any act or omission in "the design, planning, supervision, observation or management of . . . construction of an improvement to real property after 10 years have elapsed from such act or omission." Because Grace allegedly designed and manufactured the asbestos fire-proofing, Grace argues that it is entitled to protection under ¶13-214. *See St. Louis v. Rockwell Graphic Systems, Inc.*, 220 Ill. App.3d 704,707-10, 163 Ill.Dec. 142, 143-46, 581 N.E.2d 93, 94-97 (1991) (Paragraph 13-214 "expressly applies to the design and planning of the construction of an improvement to real property.").

However, in this case, Grace is a mere manufacturer of asbestos materials. It did not participate in any way in the construction of the buildings. The Court finds that the Monokote asbestos product manufactured by Grace was simply a "bag of minerals" which must be installed by a contractor. (Pl's Ex. 40, at p. 55). Grace did not furnish any equipment for the application of the asbestos materials. (Pl's Ex, 42). Nor did Grace approve of or direct the application of the asbestos materials by the contractor. (Pl's Ex. 40 at p. 57). Therefore, Grace was merely a manufacturer, not an active participant in the construction of the buildings.

The distinction between a mere manufacturer of materials and a designer or director of a construction project is crucial. Paragraph 13-214 does not immunize a mere

manufacturer of products from liability. In *Witham v. Whiting Corp.*, 975 F.2d 1342, 1345-48 (7th Cir.1992), the court held that a crane specially manufactured for use at a manufacturing plant based on information that the plant owner provided about the plant was an "improvement" to real property within ¶ 13-214. However, the court indicated that it might not apply ¶ 13-214 to a mere manufacturer of materials:

> There may be a problem with applying the improvement to real property statute of repose to a manufacturer of a product used in the improvement who was otherwise uninvolved with the particular construction project. The Missouri Supreme Court recently concluded that: manufacture at the manufacturer's factory or production site of a standard product available generally to the public that is manufactured and furnished for inclusion in the improvement by the persons constructing the improvement under circumstances where the manufacturer has no substantial on-site construction activity is not within the protection of the statute. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 837 (Mo. 1991); *see also Herriott v. Allied Signal, Inc.*, 801 F.Supp. 52 (N.D.Ill., 1992) ("We find the analysis (in *Blaske*) useful and believe that the Illinois Supreme Court would as well.").

Id. The Court also notes that this distinction is supported by other Illinois Courts. *People ex rel. Skinner v. Hellmuth, Obata & Kassabaum, Inc.*, 135 Ill.App.3d 765, 90 Ill.Dec. 448, 453, 482 N.E.2d 155, 160 (1985), *rev'd on other grounds*, 114 Ill.2d 252, 102 Ill.Dec. 412, 500 N.E.2d 34 (1986); *Board of Educ. of the City of Chicago v. A.C. & S.*,

Inc., No. 85CH00811 (Ill.Ct.Cl., Cook Cty., March 5, 1991) (text in Pl's Ex 41). The legislative history of ¶ 13-214 also indicates that the provision was intended to protect only professional activities directly related to the construction project--not mere manufacturers of goods. *See Lehmann v. Arnold*, 137 Ill. App.3d 412, 91 Ill.Dec. 914, 916-17, 484 N.E.2d 473, 475-76 (1985); *Hellmuth*, 135 Ill.App.3d at 765, 90 Ill.Dec. at 452-53, 482 N.E.2d at 159-60. Therefore, because the Court has found that Grace is a mere manufacturer of goods, it cannot avail itself of the ¶ 13-214 immunity.

(g). Breach of Duty

[14] Grace also moves for summary judgment on Count I of State Farm's complaint. Grace argues that because State Farm was aware of the asbestos-containing fireproofing material, Grace was not negligent.

Because the Court ruled that there is a material question of fact as to whether State Farm was aware of the asbestos contamination, the Court denies Grace's motion for summary judgment on Count I of State Farm's complaint.

(h). Fraud

Because the Court ruled that there is a material question of fact as to whether there was fraud or fraudulent concealment, the Court denies Grace's motion for summary judgment on Count IV of State Farm's complaint.

(i). Willful and Wanton Conduct

[15, 16] Finally, Grace moves for summary judgment on Count V of Plaintiff's complaint. Count V states a case

of "willful and wanton" conduct against Grace. Grace presents two arguments in support of summary judgment: first, that the underlying claim for willful and wanton conduct (negligence) is time-barred pursuant to the applicable statutes of limitation and repose (this argument was dismissed in the above discussion); second, even if the underlyIng claim of negligence is tenable, the facts do not support a claim of willful and wanton conduct.

The Court finds there is a genuine issue of material fact to submit to the jury on the question of willful and wanton conduct. To support a punitive damages award in a products liability suit for a manufacturer's willful and wanton conduct, a plaintiff must show facts supporting a manufacturer's conscious disregard for the safety of others. *Davis v. International Harvester Co.*, 167 Ill.App.3d 814, 825-26, 118 Ill.Dec. 589, 596, 97, 521 N.E.2d 1282, 1289-90 (1988). Because the Court found above that, in its most favorable light, the evidence indicated: (1) Grace was aware of the hazards of asbestos in installed fireproofing and consequently removed the asbestos and replaced it with paper (Pl's Ex. 19, 20, 21); and (2) despite this knowledge, Grace continued to sell the asbestos product to State Farm, the Court finds that State Farm should be able to submit this claim to the jury. *See City of Greenville v. WR. Grace & Co.*, 640 F.Supp. 559 (D.S.C.1986), *aff'd*, 827 F.2d. 975 (4th Cir. 1987) ($2 million punitive damage verdict in asbestos property damage case affirmed).

Ergo, Defendant's motion for summary judgment (d/e 49) is DENIED, except that Defendant's motion for summary judgment on Count III of Plaintiff's amended complaint (breach of warranties) is ALLOWED.